92-561

No.

Supreme Court, U.S.
FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

S&M CONSTRUCTORS, INC.,
Petitioner,

v.

THE FOLEY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petition For Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

I. Whether a subcontractor under a government contract between the United States and the general contractor may be compelled to arbitrate claims arising out of delays caused by the United States Government where the Disputes Clause of the prime contract and the terms of the Contract Disputes Act of 1978 were specifically incorporated into the subcontract and which issues in arbitration, of necessity, involve and sound against the United States Government who cannot be a party to such arbitration.

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Parent or Subsidiary Companies

There is no parent or subsidiary company to be listed.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 959 F.2d 97 (8th Cir. 1992), is reprinted as Appendix A. It affirms the opinion of the United States District Court for the Western District of Missouri, Western Division, Case No. 92-0142-CV-W-6, unreported, which is reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was made and entered on March 16, 1992. This Petition is within ninety days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests on 28 U.S.C. §1254(1).

STATUTES IN ISSUE

The statutory provisions at issue are Sections 3, 6 and 7 of the Contract Disputes Act of 1978, 41 U.S.C. §§602, 605 and 606 and Sections 2, 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§2, 3 and 4. They are reprinted as Appendix C and Appendix D, respectively.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the decision by the United States Court of Appeals for the Eighth Circuit to affirm the judgment of the United States District Court for the Western District of Missouri, Western Division, denying Petitioner's motion for an injunction enjoining arbitration between Petitioner and Respondent. The jurisdiction of the United States District Court in this case was predicated upon both

diversity of citizenship, 28 U.S.C. §1332, and federal question jurisdiction, 28 U.S.C. §1331.

The dispute between the parties arose out of Petitioner S&M Constructors, Inc.'s (hereinafter "Petitioner") subcontract with Respondent The Foley Company (hereinafter "Respondent") for excavation and other heavy underground construction services rendered at the United States Army Corps of Engineers' ("Corps of Engineers") project designated as the Power Reliability Enhancement Program (AJCC) (the "Project"), Fort Ritchie, Maryland. Respondent is the general contractor for the Project under the prime contract with the Corps of Engineers. Respondent contracted with the United States Government through its executive agency, the Corps of Engineers, for all construction aspects of the Project.

During the course of its work on the Project, Petitioner properly requested periodic payments under the S&M-Foley subcontract, several of which payments were refused by Respondent. To seek redress for this refusal of payment, a dispute only between Petitioner and Respondent, Petitioner made a demand for arbitration under the arbitration clause of the S&M-Foley subcontract. The subcontract provides in Attachment 5, Schedule D, paragraph 2:

> 2. Arbitration and Enforcement Cost. It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, Missouri. Any costs including without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.

Attachment 5, Schedule D is reprinted as Appendix E.

At this time, it was appropriate to file under the arbitration clause because only one issue, the timely payment of progress estimates, was pending, and this issue involved Petitioner and Respondent only. However, after the arbitration demand was filed, Respondent initiated a claim for delay which involved claims against the United States. Because it was inappropriate to proceed with an arbitration when there were issues pending which involved the Government, a non-party to the arbitration, Respondent, on December 6, 1990, filed an Application to Stay Arbitration in the Circuit Court of Jackson County, Missouri at Kansas City. Application to Stay Arbitration reprinted as Appendix F. Respondent expressly relied on the language of the subcontract which incorporated by reference the terms and conditions of the prime contract between Respondent and the Corps of Engineers. Specifically, Attachment 5, Schedule D, paragraph 1 provided:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and subcontractor.

Petitioner was in agreement with Respondent that the arbitration should be stayed since the Government, as cause of the delay, was inextricably linked to this cause of action.

Respondent argued in its Application to Stay that the prime contract contained a Disputes clause which states that "this contract is subject to the Contract Disputes Act of 1978, (41 U.S.C. §601-613)." The Disputes clause is reprinted as Appendix G. Respondent asserted that this provision requires that "*all* disputes

arising under *or relating* to this contract shall be resolved under this clause" [Emphasis added].

Further, Respondent maintained in its Application to Stay the arbitration that

> [t]his Disputes clause requires that any claims shall be first submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, and that his decision shall be final unless the contractor appeals or files suit as provided in the Contract Disputes Act (41 U.S.C. §601-613).

Respondent argued that the arbitration was not yet ripe since Petitioner sought to

> arbitrate disputes which either (a) have not been submitted to the Contracting Officer for a decision as required by the Disputes clause, or (b) have been submitted to the Contracting Officer for a decision but no such decision has been rendered by the Contracting Officer. *Thus, [Respondent contended] S&M's claims in its Demand for Arbitration are null and void as they are in violation of the express language of the Disputes clause in Foley's contract with the United States Government....* [Emphasis supplied]

Since Petitioner agreed with Respondent that the arbitration should be stayed because of the Government's causal involvement, Petitioner acceded to the logic of Respondent's position and did not seek to compel arbitration at that time. Petitioner agreed with Respondent that the Disputes clause and the procedures flowing therefrom represented the chosen forum for all claims involving Petitioner, Respondent and the Government. Moreover, Petitioner and Respondent were in agreement that the controversy was not yet ripe since the administrative relief provided for by the Disputes clause as incorporated into the S&M-Foley subcontract had not been exhausted.

Subsequently, in accordance with the Disputes clause of the prime contract between Respondent and the Corps of Engineers, and in accordance with the Contract Disputes Act of 1978, Petitioner, through Respondent's sponsorship, submitted claims to the Corps of Engineers Contracting Officer for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for Petitioner's personnel in a timely manner and for other Government acts or omissions. Respondent has additional claims properly sounding against the Government which aggregate in excess of two million dollars ($2,000,000.00). Thus, Petitioner's and Respondent's claims ought both to be before the Contracting Officer for his final determination. Petitioner's claims have been so submitted, but have not as yet been decided. Respondent, however, has reversed its earlier position and chosen not to submit its claims against the Government, but seeks to arbitrate them against Petitioner.

Petitioner's demands against Respondent in the arbitration proceeding are precisely the same claims for equitable adjustment that Petitioner has submitted to the Contracting Officer against the United States Government. Respondent, instead of properly filing its claims against the Government, has turned 180 degrees on its former position and has filed a counterclaim in the arbitration against Petitioner seeking $2,359,849.22 for losses caused by Petitioner's alleged delays and for alleged substandard performance by Petitioner under the S&M-Foley subcontract. Respondent's counterclaim is based primarily on the premise that Petitioner is the cause of the obstruction of Respondent's scheduling and, therefore, prevented Respondent's completion of the Project in a timely manner. The fact is, however, that nearly all of the delays upon which Respondent's counterclaim are based are, insofar as Petitioner is

involved, exactly those delays that are the basis of Petitioner's claim submitted to the Corps of Engineers' Contracting Officer for equitable adjustment in time and monies and, thus, result from commissions or omissions of the United States Government.

Approximately one year after it applied to *stay arbitration* proceedings, Respondent is now seeking to *compel arbitration*. Petitioner filed its initial Application to Stay Arbitration on January 23, 1992 before the Circuit Court of Jackson County, Missouri at Kansas City, which Application was denied on state law grounds. Petitioner, on February 14, 1992, then sought a Preliminary Injunction before the United States District Court for the Western District of Missouri, Western Division based on federal grounds which motion was denied and from which Order Petitioner appealed. On appeal, the United States Court of Appeals for the Eighth Circuit by a decision dated March 16, 1992 affirmed the judgment of the United States District Court, which judgment is now the subject of Petitioner's petition for a writ of certiorari.

ARGUMENT

The Court is presented with the issue of determining the priority of the application of two conflicting federal statutes in the context of the complex and unique rules governing contracts between executive agencies of the United States and third parties for the procurement of services, personal property or the construction, alteration or repair of real property. Specifically, the issue is whether arbitration between a prime contractor and its subcontractor under a government contract may be compelled under the Federal Arbitration Act, 9 U.S.C. §§2, 3 and 4, where the matters in question involve claims against the Government as-

serted under the Disputes clause of the prime contract and the Contract Disputes Act of 1978, 41 U.S.C. §§602, 605 and 606, incorporated therein.

It is imperative that this Court resolve this unique conflict of priority between federal statutes, each with its own rationale for enforcement. The context of government contracting warrants a close examination and the resolution of the priority as between the procedures of the Contract Disputes Act of 1978 and the enforcement mandates of the Federal Arbitration Act so that parties involved in the government contract process will be aware of their procedural remedies when claims are asserted against the Government. By failing to acknowledge the priority of the procedures dictated by the Contract Disputes Act, the Court will endorse the emasculation of the dispute resolution remedies of that Act.

In the case at bar, Petitioner initiated arbitration proceedings solely to obtain payment from Respondent under its subcontract. This action was opposed and the arbitration was placed in abeyance by the parties' mutual consent. Subsequently, Petitioner initiated a claim against the United States under the Disputes clause of the prime contract as incorporated by reference into Petitioner's subcontract. This claim was properly made pursuant to the procedures dictated by the Contract Disputes Act of 1978, which requires that claims by a contractor against the Government be submitted in writing to the contracting officer for a decision. 41 U.S.C. §605. To effect Petitioner's claim, Respondent, as prime contractor, was required to pass on this claim pursuant to the sponsorship rules previously established under government contract law since Petitioner was a subcontractor and therefore not in privity of contract with, and had no standing to pursue directly its grievances against, the Government. As noted, Petitioner's

claim primarily centered on Government caused delays involving the untimely issuance of security clearances to Petitioner's personnel. These delays are at the heart of the conflict between Petitioner and Respondent since they represent Petitioner's defense against Respondent's claim for delays in addition to being, in their own right, a compensable claim against the Government.

In spite of the fact that Petitioner had initiated the contractually mandated dispute resolution process, based on the Contract Disputes Act of 1978 and called for under the prime contract and incorporated by reference into the subcontract, Respondent unilaterally resuscitated the previously mutually agreed to stay of the arbitration proceeding, asserting claims that were substantially identical with the claims made by Petitioner against the Government. By virtue of the arbitration clause of the subcontract and the absence of privity between Petitioner and the Government, the Government could not and cannot be a party to the proposed arbitration proceeding. Consequently, Petitioner sought injunctive relief from the premature arbitration pending the exhaustion of the procedures dictated by the Contract Disputes Act of 1978.

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Western District of Missouri, Western Division, denying a stay of the arbitration proceeding. The Court, in reaching its decision, relied on recent Supreme Court cases that enforced arbitration through the application of the Federal Arbitration Act and specifically cited *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) and *Dean Witter*

Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). These cases stand for the proposition that under the Federal Arbitration Act arbitration is a favored remedy that mandates the enforcement of agreements to arbitrate statutory claims. What the Court of Appeals failed to address is the factual distinction between the instant case and the above cited cases, namely, that this case falls within the unique context of government contracting and involves claims against the government as part of its core proceeding.

It is correct that the subcontract between Petitioner and Respondent contained an arbitration clause. Such contract, by reason of the specific incorporation of the terms of the prime contract, also includes the Disputes clause requiring that "*all disputes* arising under or *relating to* this contract *shall be* resolved under this clause [emphasis added]." This language is, by design, broad and inclusive, and therefore, of sufficient breadth to incorporate all claims and disputes involving the government, its prime contractor and a subcontractor asserting claims against the Government. The Disputes clause further expressly states that "this contract is subject to the Contract Disputes Act of 1978, (41 U.S.C. §§601-613)."

In the instant case, the Government is an essential party to the resolution of the key issues in dispute. Petitioner's claims against the Government are identical to its defenses against Respondent's claims in arbitration. The delays for which Respondent seeks compensation from Petitioner are delays that were in fact caused by the Government's failure to provide security clearance for Petitioner's personnel in a timely manner. As a consequence, the United States is a necessary party to any resolution of the question whether Petitioner's delays were either compensable or excusable. By following

the disputes resolution mechanism of the Disputes clause and the Contract Disputes Act, Respondent and Petitioner will ensure, consistent with the dictates of justice, the participation of the Government in resolving matters that affect all three parties.

In reviewing the above cited authority applying the Federal Arbitration Act to various statutory remedies, the Court of Appeals failed to discern that the instant case does not involve the applicability of arbitration to enforce a statutory remedy running only between the parties to the arbitration, but rather involves a statutory procedure designed to resolve claims involving and against the Government, which procedure must be controlling in the context of government contract disputes. To compel arbitration of all issues between Petitioner and Respondent in a forum in which the principal necessary party, i.e., the Government, is unavailable and "uncompellable" flies in the face of the statutory prescription of the Contract Disputes Act of 1978 to resolve *all claims relating to* or involving the Government.

This Court has hitherto, in appropriate circumstances, declined to enforce a contract arbitration clause. *Wilko v. Swan*, 346 U.S. 427 (1953) The Court, in *Wilko v. Swan*, refused to enforce arbitration because of the statutory language and scheme of the Securities Act of 1933. Similarly, the Court should find that the disputes resolution procedures of the Contract Disputes Act are, in the instant case, controlling to resolve disputes arising within the government contract context and relating to claims asserted against and involving the Government.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), this Court reviewed the enforcement of arbitration by the Appellate Courts and noted that pendant arbitrable claims are subject to arbitration even at the

expense of judicial economy. It is Petitioner's position, however, that the instant case does not involve pendant arbitrable claims because of the claims asserted by Petitioner against and involving the Government. The statutory rationale of the Contract Disputes Act is to prescribe the procedural mechanism for *claims involving the Government*. This rationale, of necessity, renders claims against and involving the Government non-arbitrable between the prime contractor and its subcontractor only. Applying the Court's reasoning in *Dean Witter Reynolds, Inc. v. Byrd, supra*, and *Wilko v. Swan, supra*, Petitioner and Respondent should be required to exhaust the procedures dictated by the Contract Disputes Act as regards claims among themselves and the Government prior to proceeding to the arbitration of the remaining claims, if any, sounding solely between themselves.

The United States District Court for the Northern District of California in *Grinnell Fire Protection Systems Co., Inc. v. Regents of University of California*, 554 F. Supp. 495 (N.D. Cal., 1982) was confronted with a case quite similar to the instant proceeding. In *Grinnell*, a fire sprinkler subcontractor to the University of California, working pursuant to a subcontract *related to* a prime contract between the University of California and the United States Government, filed suit against the University of California ("University") for amounts alleged to be owing under its subcontract. The University moved to stay the action filed by its subcontractor on the ground that Grinnell had not yet complied with the disputes resolution clause contained in the contract. This disputes clause was the standard clause — as is the clause in the instant case — found in Government contracts which provides for resolution of disputes in accordance with the Contract Disputes Act of 1978. In reaching its decision, the court held that the dispute was

governed by federal law and that the subcontractor was not entitled to pursue other avenues without first exhausting the administrative relief provided by the disputes clause of the contract in accordance with the Contract Disputes Act of 1978. The court noted that federal law was controlling in a case such as this citing *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 644 (9th Cir. 1961) which focused on the importance of having uniform federal policy when national security and the administration of national security contracts is involved. Similarly, the Court cited with approval *United States v. Taylor*, 333 F.2d 633 (5th Cir. 1964) which held federal law controlling on the ground that the Government has an interest in the expeditious resolution of disputes involving Government contracts.

In the instant case, Petitioner is seeking the application of federal law governing the resolution of government contract disputes and the proper exhaustion of those administrative remedies provided for under the Disputes clause. It is Petitioner's position that the Court's holding in *Grinnell* is persuasive here. Both instances involve government contracts covering high security facilities with extensive government supervision of the project. Both instances warrant the application of consistent federal law compelling the resolution of matters in which the Government is a proper and necessary party and which are under consideration by the Contracting Officer before following the more limited arbitral avenue of resolution of matters in dispute between Petitioner and Respondent only. Petitioner and Respondent have not yet exhausted the administrative remedies that they initially elected to pursue under the Disputes clause and the Contract Disputes Act and again confirmed when they mutually agreed to stay the arbitration proceeding pending disposition pursuant to

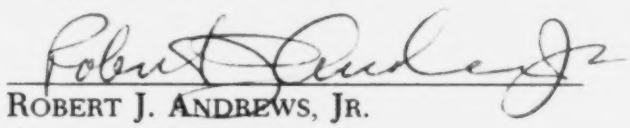
the prime contract's Disputes clause and the Contract Disputes Act of 1978. It is logical and consistent with the dictates of the Contract Disputes Act that Petitioner and Respondent must, as Respondent itself originally argued, exhaust these administrative remedies and complete the disputes resolution process they have selected and hold the arbitration in abeyance pending resolution of claims involving the Government, which claims have already been submitted pursuant to the disputes resolution procedures of the Contract Disputes Act of 1978 and the Disputes clause incorporated in the Foley-S&M subcontract.

Further, it is critical to note that Petitioner does *not* seek to enjoin arbitration permanently, but rather seeks appropriately to delay arbitration as unripe until the disputes involving Petitioner, Respondent *and the Government*, which disputes subsume and underlie almost all the disputes between Petitioner and Respondent, can be determined. Any disputes remaining, involving only Petitioner and Respondent may then be arbitrated.

Cases such as *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, *Dean Witter Reynolds, Inc. v. Byrd*, *supra*, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, *supra*, and *Shearson/American Express, Inc. v. McMahon*, should not be used as a blanket rationalization for enforcing arbitration in the unique context of claims against the Government pursuant to the government contract process where Congress has already enacted a uniform statutory scheme for resolving such disputes under the Contract Disputes Act of 1978. Within this context there is a grave need for this Court to resolve the priority of the Contract Disputes Act vis-à-vis the enforcement of arbitration pursuant to the Federal Arbitration Act.

In summary and for the reasons set forth above, this Court should exercise its authority and grant this petition to clarify this unique conflict of federal statutes in the area of government contract law.

Respectfully submitted,



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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1423

S&M CONSTRUCTORS, INC.
Plaintiff-Appellant,

v.

THE FOLEY COMPANY
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Missouri.

[PUBLISHED]

Submitted: March 11, 1992

Filed: March 16, 1992

Before: JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

S&M Constructors, Inc., appeals from an order of the district court denying its motion for a preliminary injunction to halt arbitration proceedings which were scheduled to commence February 25, 1992. S&M has presented a motion for stay pending appeal. We set the motion for oral argument and stayed commencement of arbitration until the motion could be heard. We now deny the motion for stay.

S&M was a subcontractor of Foley Company, which had contracted with the Corps of Engineers to construct defense related facilities requiring security clearances. The project has been completed. The contract between S&M and Foley contained an arbitration clause. Foley's contract with the Corps provided that the contractor would submit claims to the government under the Contract Disputes Act. 41 U.S.C. §601-613. The contract terms were incorporated in the S&M subcontract. S&M filed a notice of arbitration, and Foley asserted counterclaims against S&M. Foley, at S&M's request, has filed claims with the contracting officer under the Contract Disputes Act. Foley filed an application to stay arbitration in the Circuit Court of Jackson County, Missouri in the fall of 1991, but this action was evidently dismissed by agreement of the parties. The arbitration was scheduled to commence in February, 1992. On January 23, 1992, S&M filed a petition for a temporary restraining order in the Circuit Court of Jackson County, Missouri. A temporary restraining order was entered but was dissolved by that court in an order dated February 10, 1992. The arbitration was then scheduled for February 25, 1992.

On February 14, S&M filed this motion for temporary restraining order in the United States District Court, and a hearing was held in which the district court considered the case as a motion for preliminary injunction against the arbitration proceedings. The district court applied only one of the factors under *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), whether S&M had demonstrated the strong likelihood of success on the merits. The district court determined that the Contracts Disputes Act does not require that the arbitration be stayed; that S&M had failed to demonstrate that the contracting parties had intended, through the incorporation clause, to require that the

Contracts Disputes Act procedures take precedence over arbitration; and that the arbitrators may of course consider the practicalities springing from the arbitration going forward in the face of claims that were asserted under the Contracts Disputes Act. The preliminary injunction was denied.

In deciding S&M's motion for stay pending appeal, we consider the four factors that are employed by the district court in considering preliminary injunctive relief, of which we believe likelihood of success on the merits is most significant. *James River Flood Control Association v. Watt*, 680 F.2d 543, 544; *Hilton v. Braunskill*, 481 U.S. 770 (1987). S&M relies principally on two district court decisions in arguing that the administrative procedures of the Contract Disputes Act take precedence over arbitration. *Grinnell Fire Protection Systems, Inc. v. Regents of the University of California*, 554 F.Supp. 495 (D.C., N.D. Ca. 1982) stayed consideration of a diversity action asserting contract disputes so that a contractual dispute resolution procedure before the Department of Energy's Contracting Officer could be utilized. The contract in question was a national security related energy research and development program. As this involves the staying of diversity litigation before the court, we do not believe that *Grinnell* supports S&M's position. S&M also relies on *Bache Halsey Stuart, Inc. v. French*, 425 F.Supp. 1231 (D.C., D.C. 1977) in which the court held that arbitration proceedings should be stayed to allow administration adjudication of the claims by the Commodity Futures Trading Commission pursuant to procedures established under section 14 of the Commodity Exchange Act, 7 U.S.C. section 18. Judge Sirica relied primarily on *Wilko v. Swan*, 346 U.S. 427 (1953) in concluding that there were some exceptions to the Arbitration Act.

Since *Grinnell* and *French* were decided, the Supreme Court in a number of cases has enforced arbitration in securities and RICO disputes, and of antitrust claims, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 475 U.S. 614 (1985); *Shearson/American Express, Inc. v McMahon*, 482 U.S. 220, 225-238 (1987). While S&M argues that it will be irreparably harmed by bifurcated proceedings, the Supreme Court has held that arbitration must go forward even under such circumstances. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 461 U.S. 1, 20 (1983), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

The cases relied upon by S&M have little persuasive weight in light of these later decisions of the Supreme Court underscoring the enforceability of arbitration agreements. Although we agree with S&M that the court has jurisdiction to decide whether the contracting parties intended the Contract Disputes Act procedures to precede arbitration, *see Gelco Corp. v. Baker Ind., Inc.*, 779 F.2d 26, 28 (8th Cir. 1985), S&M has failed to demonstrate the likelihood that it will succeed on the merits of this contract claim. Accordingly, we must deny the motion for a stay pending appeal.

We share the views expressed by the district court that the arbitration panel should take into consideration the proceedings under the Contract Disputes Act and tailor relief accordingly. Indeed, we note that counsel for Foley conceded at oral argument that the arbitrators should stay S&M's claim in arbitration to the extent that claim has also been submitted to the government con-

tracting officer under the Contracts Disputes Act procedures.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix B

In the
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

S&M CONSTRUCTORS, INC.,
Plaintiff,

v.

THE FOLEY COMPANY,
Defendant.

No. 92-0142-CV-W-6

MEMORANDUM AND ORDER

Pending before the court is plaintiff's motion for a preliminary injunction against arbitration proceedings scheduled to commence next week. Plaintiff is a subcontractor with defendant government contractor. The contractor, Foley, is prepared to present pending disputes between the parties to arbitration, pursuant to the arbitration clause of the subcontract (§2, Attachment 5, Schedule D, "additional provisions"). The subcontractor, S&M, contends there should be no arbitration proceedings until resolution of the disputes (or at least related disputes) under the Contract Disputes Act, 41 U.S.C. §§601-613, and provisions in the prime contract relating to dispute resolution. All contract documents between Foley and the Government are incorporated in the subcontract by reference and "shall be binding upon and provide entitlement to, *mutatis mutandis*, the Foley Co. and Subcontractor" (§1, Attachment 5, Schedule D, "additional provisions").

A preliminary injunction hearing was held yesterday. The essential factors appear to be undisputed. Neither party offered more than argument of counsel. Certain peripheral factual matters, referred to by counsel, may well be in conflict. The court does not purport to have a full understanding of the background of the case after an argument of an hour and a half, covering much material not of record in this case. Enough is known, however, to permit a ruling in which the court has some confidence.

Normally the court would analyze the *Dataphase* factors, as set forth by the Eighth Circuit Court of Appeals. *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). In this case, however, likelihood of success is deemed controlling. Plaintiff will obtain judicial relief now or never, given the arbitration schedule.

On its face, the arbitration clause appears to have been properly invoked by Foley. S&M contends, however, that there are two conflict resolution procedures available, and that preference should be given to certain proceedings already begun under the Contract Disputes Act. Standard arbitration is said to be precluded by the language of the arbitration clause which confines it to proceedings "permitted by law." Since the general contract requires that "all disputes arising under or relating to this contract shall be resolved under this clause," it is suggested that the mandatory method of dispute resolution is therein specified and supersedes the general arbitration clause.

The court is unable, however, to find that standard arbitration is in any sense prohibited "by law." The exception to arbitration seems to refer to limitations on arbitration created by statute or judicial rulings (generally tied to constitutional concepts such as sovereign

immunity). In this instance, I find nothing in the Contract Disputes Act that precludes ordinary arbitration of disputes between government contractors and their subcontractors.[1] The related statutory language distinctly refers to contractor disputes with the Government. 41 U.S.C. §605(a). While it has been construed to affect disputes between subcontractors and the Government, the present arbitration does not, as described, directly affect the Government (which appears to be one of S&M's concerns, when asserting the possibility of different results). *Compare Carroll v. U.S. Postal Service*, 764 F.Supp. 143 (E.D. Mo. 1991); *Eastern, Inc. v. Shelly's of Delaware, Inc.*, 721 F.Supp. 649 (D. N.J. 1989); *Riley Electric Co. v. American District Telegraph Co.*, 715 F.Supp. 813 (W.D. Ky. 1989).

The arbitration clause upon which Foley relies therefore appears to have been soundly invoked.

In the alternative, even if there is some ambiguity in the two paragraphs of Attachment 5, or some potential conflict that needs resolution, the controlling case law leaves such resolution to the arbitrators rather than the court. If Foley had sought an order *compelling* arbitration, the court would be required to grant it, " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *Gelco Corp. v. Baker Industries, Inc.*, 779 F.2d 26, 28 (8th Cir. 1985). If the arbitration clause can reasonably be construed to cover the dispute, arbitration must be compelled. *Id.*

In the instant case, it can easily be argued that the arbitration clause specified by the parties was intended to have comprehensive effect, and that the incorpora-

[1] Plaintiff's claim that arbitration presents awkward problems does not suffice, in my judgment, to make it legally impermissible.

tion of the provisions of the contract between Foley and the Government was unaffected by the extraneous provision showing how disputes between Foley and the Government should be resolved. Thus I can find no basis for an order stopping arbitration.

This ruling does not, of course, attempt to provide guidance to the arbitrators. By their independent reading of the contract language, with the business sophistication and care anticipated from arbitrators, they may conclude that S&M is entitled to a complete or partial stay of arbitration. Presumably they may also consider the practicalities urged upon me by S&M. The judicial approach to arbitration is somewhat less influenced by the practicalities; for example, a court must compel arbitration of arbitrable claims even if this would result in the maintenance of separate proceedings in different forums. *Nesslage v. York Securities, Inc.*, 823 F.2d 231 (8th Cir. 1987).

Consideration has been given to the district court rulings cited by plaintiff, but I do not find them dispositive. For the reasons stated, the motion for preliminary injunction is hereby DENIED.

HOWARD F. SACHS, CHIEF
JUDGE
UNITED STATES DISTRICT COURT

Dated: February 21, 1992

Appendix C

CONTRACT DISPUTES ACT OF 1978, 41 U.S.C.

§602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for —

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

§605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not

.extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 —

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

§606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Appendix D

TITLE 9
ARBITRATION

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to

compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or of the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of arbitration, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in

writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Appendix E

ATTACHMENT 5

SCHEDULE D
ADDITIONAL PROVISIONS
TO SUBCONTRACT NO. 2360-01-01-02310

1. Incorporation Provision — All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and Subcontractor.

2. Arbitration and Enforcement Costs — It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, MO. Any costs including, without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.

FOLEY COMPANY	S & M CONSTRUCTORS, INC.
By _____	By _____
Kenneth A. Kure	Victor J. Scaravilli
TITLE *Vice President*	TITLE *President, CEO*

Appendix F

In the CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS, CITY

THE FOLEY COMPANY, A Missouri Corporation, *Plaintiff*, vs. S & M CONSTRUCTORS, INC. (Serve: Theodore A. Gullia, Jr. Registered Agent 850 Halle Building Cleveland, Ohio 44115) *Defendant.*	Case No. CV 90-32241 CIVIL B

PLAINTIFF'S APPLICATION TO STAY ARBITRATION

COMES NOW the Foley Company (herein "Foley") pursuant to R.S.Mo. §435.355 and applies to this Court for a stay of the arbitration proceedings commenced by defendant S & M Constructors, Inc. (herein "S & M"). In support of this Application, Foley states:

1. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

2. S & M is an Ohio corporation in good standing, with its offices at 29100 Hall Street, Solon, Ohio 44139. S & M may be served through its registered

agent,Theodore A. Gullia, Jr., 850 Halle Building, Cleveland, Ohio 44115.

3. On or about October 24, 1990, S & M, through its attorneys, filed a Demand for Arbitration with the American Arbitration Association, demanding that Foley arbitrate disputes arising under S & M's subcontract with Foley for a project for the United States Army Corps of Engineers known as the Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the Project"). The Demand for Arbitration was transferred to Kansas City from Washington, D.C. upon Foley's notification to the American Arbitration Association that the subcontract between S & M and Foley, required any arbitration to be held in Kansas City, Missouri. (A true and correct copy of the Demand for Arbitration is attached as Exhibit 1. A true and correct copy of S & M's subcontract with Foley is attached as Exhibit 2).

4. The American Arbitration Association has requested that the parties choose arbitrators and that Foley file its Answer and any counterclaim by December 6, 1990. (A true and correct copy of correspondence from the American Arbitration Association to this effect is attached as Exhibit 3).

5. S & M agreed in its subcontract with Foley, Attachment 5, Schedule D, paragraph 1 of the Additional Provisions, that "all various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and Subcontractor." (Exhibit 2).

6. Foley's contract documents with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which requires that all disputes arising

under or relating to the contract shall be resolved under that clause. A true and correct copy of this Disputes clause is attached as Exhibit 4. This Disputes clause requires that any claims shall be first submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, and that his decision shall be final unless the contractor appeals or files a suit as provided in the Contracts Disputes Act (41 U.S.C. §601-613).

7. Foley's contract documents with the Owner, the United States Army Corps of Engineers, contains a Changes clause which requires that the contractor must assert its right to an increase in the contractor's cost of, or the time required for, the performance of any part of the work under the contract within thirty (30) days after receipt of a written change order or the furnishing of a written notice from the Corps of Engineers. The contractor must submit to the Corps of Engineers' Contracting Officer a written statement describing the general nature and amount of the contractor's proposal. A true and correct copy of this Changes clause is attached as Exhibit 5.

8. By virtue of the clause in S & M's subcontract with the Foley Company which incorporates all of the provisions of Foley's contract documents with the Owner, as set forth above, this Disputes clause and Changes clause are part of S & M's subcontract with Foley and are binding upon S & M.

9. In its Demand for Arbitration, S & M seeks to arbitrate disputes which either (a) have not been submitted to the Contracting Officer for a decision as required by the Disputes clause, or (b) have been submitted to the Contracting Officer for a decision but no such decision has yet been rendered by the Contracting Officer. Thus, S & M's claims in its Demand for

Arbitration are null and void as they are in violation of the express language of the Disputes clause in Foley's contract with the United States Government, which is incorporated into S & M's subcontract as described above.

10. In addition, in its Demand for Arbitration, S & M seeks to arbitrate disputes which must be handled through the process required by the Changes clause, but said disputes either (a) have not been submitted to the Contracting Officer to seek an adjustment increasing the time and cost as required by the Changes clause, or (b) have been submitted to the Contracting Officer for a decision under the Changes clause but no such decision has yet been rendered by the Contracting Officer. Thus, S & M's claims in its Demand for Arbitration are null and void as they are in violation of the express language of the Changes clause in Foley's contract with the United States Army Corps of Enginers, [sic] which is incorporated into S & M's subcontract as described above.

11. In addition, Foley has been damaged by S & M's actions on the Project and intends to file a claim or counterclaim against S & M. However, many of the damages which Foley will assert against S & M are not yet known to Foley as the full impact of S & M's actions on Foley cannot be determined until the end of the construction Project, and until the Contracting Officer has issued all of his decisions. This is a large, multimillion dollar, complex Government construction project with very tight scheduling, and S & M's delays and failure to perform its work have had adverse effects on Foley in an amount in excess of $2,000,000.00. All of Foley's damages against S & M cannot be determined as of this date and will not be capable of ascertainment until the end of the Project, and until the Contracting

Officer has issued all of his decisions. Foley expects that its damages against S & M may exceed $15,000,000. Any decision rendered by arbitrators at this point would necessarily be incomplete and could not constitute a final decision regarding the disputes between Foley and S & M. Thus, this matter is not yet ripe for determination.

12. R.S. Mo. §435.355 (2) provides that "on application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." The only agreement to arbitrate between the parties arises out of S & M's subcontract with Foley, which also contains the incorporated requirement that S & M first proceed with its claims under the procedure required by the Disputes and Changes clauses of Foley's contract with the Owner, as set forth above. As S & M failed to comply with the requirements of the Disputes and Changes Clause, S & M is in violation of the contract which contains the arbitration clause upon which S & M relies. There is therefore no agreement to arbitrate as the arbitration clause cannot be applicable until S & M exhausts its remedies required by the Disputes and Changes clauses as set forth above.

13. Foley requests that this Court should set this matter for an evidentiary hearing as R.S. Mo. §435.355(2) states that "such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration."

WHEREFORE, plaintiff the Foley Company prays that this Court may grant plaintiff's Application to Stay Arbitration and that this Court may enter its Order staying the arbitration demanded by defendant S & M Con-

structors, Inc. and that this Court may set this matter for an evidentiary hearing, and for all costs, and for any other relief which this Court may deem appropriate.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 471-7000

Kevin E. Glynn #21935
William J. DeBauche #32674
ATTORNEYS FOR
PLAINTIFF
THE FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 6th day of December, 1990 to:

ROBERT J. ANDREWS, JR.
Andrews & Ryan
21900 [sic] Hall Street
Solon, Ohio 44139
Attorneys for Defendant
S & M Constructors, Inc.

Attorneys for Plaintiff
The Foley Company

Appendix G

DISPUTES CLAUSE OF PRIME CONTRACT

I. 48 DISPUTES (1984 APR) FAR 52.233-1

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d) (1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding $50,000, the Contractor shall submit with the claim a certification that —

(i) The claim is made in good faith;

(ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and

(iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(3) (i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contractor is not an individual, the certification shall be executed by —

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of Contractor's affairs.

(e) For Contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certi-

fied if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

No. 92-56

In The

Supreme Court of the United States

October Term, 1992

S&M CONSTRUCTORS, INC.,

Petitioner,

v.

THE FOLEY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. When a subcontractor has filed a demand for arbitration under an arbitration clause in its subcontract with a general contractor, and when the general contractor has filed a counterclaim against the subcontractor in that arbitration, may the subcontractor have the entire arbitration stayed by court order because the subcontractor would also like to assert claims against the United States Government in separate proceedings?

LIST OF PARTIES

Respondent the Foley Company has no subsidiary or parent corporations.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The pertinent opinions below are included in the Petitioner's Appendix and in Respondent's Appendix. The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 959 F.2d 97 (8th Cir. 1992), is reprinted as Appendix A to Petitioner's Appendix. The opinion of the United States District Court for the Western District of Missouri, Western Division, Case No. 92-0412-CV-W-6, which is unreported, is reprinted as Appendix B to Petitioner's Appendix.

A copy of the Order of the Circuit Court of Jackson County, Missouri, dated February 10, 1992, is unreported and is included in Respondent's Appendix, pages 1-2.

Respondent agrees that Petitioner's Petition was filed within ninety (90) days of the judgment of the United States Court of Appeals for the Eighth Circuit, and that a Writ of Certiorari may be granted to review cases in the Courts of Appeals pursuant to 28 U.S.C. §1254(1).

JURISDICTION

STATUTES

There are no constitutional issues involved in this case and no constitutional provisions are pertinent. Respondent does not believe that the Contract Disputes Act of 1978, 41 U.S.C. §601 *et seq.*, governs this case, but acknowledges that petitioner has advanced arguments containing 41 U.S.C. §§602, 605 and 606 of the Contract Disputes Act of 1978. Respondent believes that only 9 U.S.C. §2 applies to this case.

STATEMENT OF THE CASE

Petitioner S&M Constructors, Inc. has submitted an inaccurate, incomplete account of the facts. Respondent the Foley Company incorporates the statement of the facts set forth in the opinion of the United States Court of Appeals for the Eighth Circuit (Petitioner's Appendix, pages A-1 through A-5). In addition, the Foley Company will address S&M Constructors' misstatements of fact and

will provide additional facts which have a bearing on the issues in this case.

The dispute between the parties arose out of S&M Constructors' subcontract with general contractor the Foley Company for construction services at a federal project known as Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the Project").

Disputes arose between S&M Constructors and the Foley Company on the Project and while construction was still underway, S&M Constructors filed a Demand for Arbitration with the American Arbitration Association on October 24, 1990. (Respondent's Appendix, pages 3-5). Foley filed an Application to Stay Arbitration on December 6, 1990. S&M Constructors filed an Answer to Foley's Application to Stay Arbitration, on February 18, 1991. S&M argued that arbitration should be compelled. (Respondent's Appendix, pages 6-11). On September 27, 1991, Foley dismissed its Application to Stay Arbitration upon the agreement of the parties. (Respondent's Appendix, pages 12-14).

On November 1, 1991, counsel for S&M Constructors and Foley attended a preliminary hearing with the arbitrators and a schedule for the arbitration was set, with the arbitration hearing to commence on February 3, 1992. Pursuant to the schedule set on November 1, Foley Company filed an Amended Answer and Counterclaim on December 16, 1991, alleging damages of more than $2.3 million against S&M Constructors. (Respondent's Appendix, pages 15-19). Both S&M Constructors and Foley Company filed Statements of Facts in the arbitration for

the benefit of the arbitrators on January 16, 1991. (Respondent's Appendix, pages 20-29).

On January 23, 1992, S&M Constructors filed a Petition for a Temporary Restraining Order and a Preliminary Injunction in the Circuit Court of Jackson County, Missouri, to stop the arbitration from commencing. (Respondent's Appendix, pages 30-36). The Circuit Court of Jackson County, Missouri initially issued a temporary restraining order until the matter could be heard, but then dissolved the temporary restraining order and denied S&M Constructors' motion for preliminary injunction on February 10, 1992. (Respondent's Appendix, pages 1-2).

On February 14, 1992, S&M Constructors filed a Motion for Temporary Restraining Order in the United States District Court, Western District of Missouri, to stop the arbitration. (Respondent's Appendix, pages 37-44). The United States District Court issued its decision on February 21, 1992, denying S&M Constructors' Motion. (Petitioner's Appendix, pages A6-A9).

On February 24, 1992, S&M Constructors filed several pleadings in the United States Court of Appeals for the Eighth Circuit, including a Motion for Stay Pending Appeal, and a Motion for Temporary Stay of Arbitration. (Respondent's Appendix, pages 45-48). The United States Court of Appeals for the Eighth Circuit issued its decision denying S&M's Motions on March 16, 1992. (Petitioner's Appendix, pages A1-A5).

S&M Constructors filed a Motion in the United States Court of Appeals for the Eighth Circuit on March 18,

1992, to stay enforcement of the Court of Appeals' decision pending an application to this Court for a Petition for Writ of Certiorari. The United States Court of Appeals issued its decision denying S&M Constructors' Motion on March 27, 1992.

The American Arbitration Association rescheduled the arbitration for March 31, 1992. On March 30, 1992, one day before the arbitration was scheduled to commence, S&M Constructors filed a Chapter 11 bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Ohio, Case No. B92-11872. S&M Constructors' bankruptcy is still pending.

S&M Constructors' demand for arbitration sought damages against the Foley Company in the amount of $1,112,648.63. (Respondent's Appendix, pages 3-5). S&M Constructors filed a pleading explaining to the arbitrators that this amount consists of claims against the Foley Company for non-payment of invoices in the amount of $297,215.25, and other claims in the amount of $815,432.88 for delays in obtaining security clearances, claims for additional work and claims for changed conditions. (Respondent's Appendix, pages 25-29).

S&M Constructors' contentions at pages 2 and 3 of its Petition are incorrect and misleading. S&M Constructors' Demand for Arbitration, filed on October 24, 1990, sought compensation from the Foley Company for delay claims and other claims which S&M Constructors now contends are claims to be made against the Government under the Contract Disputes Act. (Respondent's Appendix, pages 3-5, 25-26). The Foley Company has claims against S&M

Constructors because S&M's work was deficient, defective, delayed far past the schedule required by the Government, and not in conformance with the Government's contract documents. (Respondent's Appendix, pages 15-24). Thus, it is inaccurate for S&M to state that S&M "properly requested periodic payments under the S&M-Foley subcontract, several of which payments were refused by Respondent." S&M Constructors sought not only those payments, but also delay damages and other claims in its Demand for Arbitration, and the Foley Company had legitimate claims against S&M Constructors at the time of the presentation of the periodic pay requests which far exceeded the amounts of those requests.

The first two sentences in the first full paragraph of page 3 of S&M's Petition are inaccurate as S&M Constructors' Demand for Arbitration initially included delay damages and other claims which S&M Constructors asserts against the Government as well. (Respondent's Appendix, pages 3-5, 25-26).

S&M's statement on page 3 that "Petitioner was in agreement with Respondent that the arbitration should be delayed since the Government, as cause of the delay, was inextricably linked to this cause of action" is false as S&M Constructors filed an Answer to Foley's initial Application to Stay Arbitration in which S&M Constructors disagreed with that contention and argued that the arbitration should proceed and that the Government was not a necessary party. (Respondent's Appendix, pages 6-11). S&M's final paragraph on page 4 is also false for the same reason. S&M omits the fact that the Foley Company dismissed the Application to Stay Arbitration on

September 27, 1991. (Respondent's Appendix, pages 12-14).

The entire first paragraph on page 5 of S&M Constructors' Petition is false and misleading. It is true that S&M Constructors submitted claims to the Government for security clearance delays and for other Government acts and omissions. However, S&M Constructors has alleged the same security clearance delay claims and other claims against Foley Company in the arbitration, beginning with its Demand for Arbitration and continuing through its submission of a Pre-hearing Statement on January 16, 1991, (Respondent's Appendix, pages 3-5, 25-29). The Foley Company does *not* have additional claims filed against the Government which aggregate in excess of $2,000,000 as contended by S&M Constructors. Instead, the Foley Company has asserted these claims against S&M Constructors, as explained in its Amended Answer and Counterclaim and Statement of Facts in the arbitration. (Respondent's Appendix, pages 15-24). At the time of the filing of this Brief in Opposition, the Foley Company has not submitted any claims to the Government (although Foley may submit claims to the government in the future in order to avoid the over three hundred days of liquidated damages which the Government has asserted against the Foley Company for the delays caused by S&M Constructors).

S&M Constructors' statement in the second paragraph on page 5 of its Petition that "Petitioner's demands against respondent in the arbitration proceeding are precisely the same claims for equitable adjustment that Petitioner has submitted to the Contracting Officer against the United States Government" is not true as some of the

claims submitted by S&M Constructors, as described in S&M's Preliminary Statement, have not been submitted to the Government and are brought against Foley only, such as the claims for non-payment of invoices. (Respondent's Appendix, pages 25-29).

S&M Constructors mentions Foley's initial Application to Stay Arbitration, which was dismissed by agreement of the parties on September 27, 1991. (Respondent's Appendix, pages 12-14). However, S&M omits the fact that it has reversed its position 180 degrees from the Answer which it filed to Foley's initial Application to Stay Arbitration. (Respondent's Appendix, pages 6-11). In that Answer, S&M Constructors argued that Foley should be compelled to arbitrate despite the fact that some of the claims may be presented against the Government under the Contract Disputes Act. (Respondent's Appendix, pages 6-11).

S&M Constructors falsely states at pages 5 and 6 of its Petition that "Respondent's Counterclaim is based primarily on the premise that Petitioner is the cause of the obstruction of Respondent's scheduling and, therefore, prevented Respondent's completion of the Project in a timely manner" and that these delay claims are really the fault of the Government. Many of the Foley Company's claims against S&M Constructors do not relate to delays for which the Government had any responsibility. Instead, many of Foley's claims against S&M relate to S&M's defective and deficient work, such as tunneling a hole in a mountain at the wrong elevation, overexcavating many areas, failing to control wet zones during shotcrete work, performing improper scaling of rock, causing noxious smoke and fumes to fill the tunnels, and failing

to pay subcontractors and suppliers even after Foley had paid S&M to pay the subcontractors and suppliers. (Respondent's Appendix, pages 15-24). These claims are not delay claims and do not involve the Government.

S&M Constructors' statement in the first sentence of the first full paragraph on page 6 omits the fact that approximately one year after S&M sought to *compel arbitration* (Respondent's Appendix, page 6-11), S&M filed pleadings and appeals in every imaginable forum to *stay the arbitration which S&M initiated.* After every appeal failed, and one day before the arbitration was to commence, S&M filed for bankruptcy and the automatic stay provisions of 11 U.S.C. §362 stayed the arbitration.

SUMMARY OF ARGUMENT

S&M Constructors' Petition for Writ of Certiorari should be denied because the decision of the United States Court of Appeals for the Eighth Circuit correctly states the applicable decisions of this Court. The Court of Appeals' decision does not conflict with the decision of any other United States Court of Appeals, does not conflict with any Missouri state court decisions, and does not depart from the accepted and usual course of judicial proceedings.

The United States Court of Appeals for the Eighth Circuit correctly stated that this Court has decided that arbitration brought pursuant to a contract clause must go forward even if one of the parties claims that bifurcated proceedings will result. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v.*

Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

S&M Constructors has failed to meet its burden to show congressional intent to preclude a waiver of judicial remedies for claims brought under the Contract Disputes Act. *Shearson/American Express*, at 226-227; *Mitsubishi Motors Corp.*, at 628.

There is no legal authority in support of S&M's contention that when a subcontractor has made a demand for arbitration under an arbitration clause in a contract with the general contractor, and the general contractor files counterclaims against the subcontractor in that arbitration, the subcontractor may have the entire arbitration stayed because the subcontractor would like to bring claims against another party in another dispute resolution forum. There is no merit in S&M's position.

ARGUMENT

The United States Court of Appeals for the Eighth Circuit correctly decided this case, applying several decisions of this Court which hold that a demand for arbitration under a contractual arbitration clause will be upheld and the arbitration will be compelled to proceed even if one party believes that the arbitration would result in piecemeal litigation in other forums. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213

(1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). S&M's arguments are contrary to these decisions and S&M presents no contrary authority of any consequence. S&M Constructors' arguments are without merit and this Court should deny S&M's Petition.

S&M Constructors filed the initial Demand for Arbitration under its subcontract with the Foley Company. S&M Constructors has not alleged that its subcontract with the Foley Company should be revoked or that any grounds exist for the revocation of the contract. Pursuant to 9 U.S.C. §2, the arbitration clause in the subcontract between S&M and Foley is "valid, irrevocable, and enforceable." (Petitioner's Appendix, page 13).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that an antitrust dispute was subject to arbitration under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, even if some of the claims involved causes of action conferred by federal statutes. This Court stated: "(b)y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*, at 628. This Court also found that:

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. *Id.*, at 628.

This Court restated this principle in *Shearson/American Express* and found that the burden is on the party opposing arbitration to come forward with evidence of Congressional intent to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.*, at 226-227.

S&M Constructors has failed to meet its burden as it has shown no congressional intent to preclude a waiver of judicial remedies for claims brought under the contract Disputes Act of 1978, 41 U.S.C. §601 *et seq.* S&M Constructors states that despite its initial Demand for Arbitration against the Foley Company, in which it sought all of its present claims against the Foley Company, it now wants to bring some of its claims in a separate proceeding under the Contract Disputes Act. S&M has stated no legal authority and shown no congressional intent in support of its contention that claims under the Contract Disputes Act of 1978 should be considered non-arbitrable as a matter of law, if such claims also fall within the arbitration clause of a contract.

Apart from these legal precedents, S&M Constructors' arguments are based upon a false and misleading factual contention that all of the claims between S&M Constructors and the Foley Company are also claims which could be brought against the United States Government. The pleadings filed in the arbitration by both S&M Constructors and the Foley Company disprove this contention and show instead that both parties have brought claims in the arbitration which are asserted only against each other, and which could not possibly be brought against the United States Government. (Respondent's Appendix, pages 3-5, 15-29). The Foley Company has claims against S&M Constructors for S&M's defective

and non-conforming work such as tunneling into a mountain at the wrong elevation, failure to control wet zones during shotcrete work, improper scaling of rock during tunneling work, allowing noxious smoke and fumes to enter tunnels, and failure to pay subcontractors and suppliers even though the Foley Company had paid S&M Constructors to pay those subcontractors and suppliers. These claims are brought by the Foley Company against S&M Constructors, not the United States Government.

Similarly, S&M Constructors has claims which can be brought only against the Foley Company, such as S&M's allegations that the Foley Company has wrongfully withheld payments for invoices from S&M Constructors. Thus, this case does not involve claims which were brought in arbitration but which could also be brought against the United States Government. This case could not be simply transferred as a whole out of the arbitration proceeding and into a proceeding against the United States Government under the Contract Disputes Act.

S&M Constructors complains at page 8 of its Petition that the United States Government could not be a party to the proposed arbitration proceeding. However, this is a common situation in construction arbitration proceedings, as often one of the parties wishes that a surety, architect, engineer or owner's representative, who is not a party to the arbitration agreement, could be brought into the arbitration to share in the responsibility. This Court and the United States Court of Appeals for the Eighth Circuit have held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Technologies, Inc. v. Communication Workers of*

America, 475 U.S. 643, 648 (1986); *United States of America for the use and benefit of Capital Electric Construction Co., Inc. v. Pool & Canfield, Inc.*, 778 F.Supp. 1088, 1090 (W.D. Mo. 1991). The Court in *Capital Electric, supra*, held that a subcontractor seeking to arbitrate with a general contractor under an arbitration clause in its subcontract could not force a surety company, not a party to that contract, to arbitrate. The fact that the United States Government is not a party to the S&M-Foley contract is of no consequence to the enforceability of the contract's arbitration clause. S&M Constructors could have excluded claims against the United States Government from the contractual arbitration clause, but did not. *Mitsubishi Motors*, at 628.

S&M Constructors states on page 9 of its Petition that the United States Court of Appeals for the Eighth Circuit erred in not considering the "unique context of government contracting". S&M's contention is contrary to this Court's holding in *Mitsubishi Motors Corp., supra* that "(h)aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628. S&M Constructors has failed to show any congressional intent to preclude a waiver of judicial remedies in the context of government contracting. The "factual distinction" urged by S&M Constructors in the first paragraph on page 9 of its Petition is not supported by any legal authority and represents only an invention of S&M Constructors. S&M's arguments in the first full paragraph at page 10 of its Petition fail for the same reason.

S&M Constructors relies on *Grinnell Fire Protection Systems Co., Inc. v. Regents of University of California,* 554 F.Supp. 495 (N.D. Cal. 1982), but that case is inapplicable. As noted by the United States Court of Appeals for the Eighth Circuit, *Grinnell* does not involve the Contract Disputes Act, involves the staying of diversity litigation, and was decided before this Court's decisions in *Mitsubishi Motors Corp., supra; Shearson/American Express, supra; Moses H. Cone Memorial Hospital, supra;* and *Dean Witter Reynolds, supra.*

S&M Constructors relies on *Wilko v. Swan,* 346 U.S. 427 (1953), but this Court has held that an argument based upon *Wilko v. Swan* is no longer persuasive under these circumstances. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 231-232 (1987).

S&M Constructors' rhetoric about the "grave need" for this Court to examine this issue ignores S&M's failure to come forward and meet its burden to show that Congress has shown an intent to preclude a waiver of judicial remedies for claims brought under the Contract Disputes Act. *Mitsubishi Motors Corp.,* at 628; *Shearson/American Express, Inc.,* at 226-227. S&M Constructors cites no applicable legal authority and presents no Congressional intent in support of its arguments. The decision of the Eighth Circuit Court of Appeals is correct and S&M Constructors' arguments are without merit.

CONCLUSION

For these reasons, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KEVIN E. GLYNN
Counsel of Record
WILLIAM J. DEBAUCHE
NIEWALD, WALDECK & BROWN
1200 Main Street, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

Counsel for Respondent

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

S&M CONSTRUCTORS, INC.,	)	
Plaintiff,	)	Case No.
	)	CV92-1585
vs.	)	Civil F
THE FOLEY COMPANY,	)	
	)	
Defendant.	)	

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER AND DENYING PRELIMINARY INJUNCTION

This matter comes on for hearing before the Court this 10th day of February, 1992. Plaintiff appears by counsel Robert Andrews and Ronald Kraft and defendant Foley Company appears by counsel Kevin Glynn and by representative Ken Kure.

After hearing argument and reviewing the briefs of the parties on the legal issues involved the Court finds that:

1. A valid arbitration agreement exists between the parties as a provision of the written contract between the parties.

2. The law obtaining in this state favors the enforcement of arbitration agreements.

3. The Court determines that the disputes between the parties are encompassed in the arbitration agreement.

4. The Court finds that the agreement to arbitrate was freely entered into between the parties.

5. The Court finds that pursuant to Section 435.355 of the Missouri Revised Statutes and having found existence of a valid arbitration agreement the Court is required to dissolve the temporary restraining order heretofore entered.

NOW THEREFORE IT IS ORDERED that the temporary restraining order heretofore entered is dissolved and the Petition for Temporary Injunction is denied. The costs of this action are assessed against the plaintiff.

/s/ Preston Dean
Judge

Date: February 10, 1992
Time: 9:30 A.M.

Copies to:

Kevin E. Glynn
Ronald Kraft
Robert Andrews

MEDIATION Please consult the Construction Industry Mediation Rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

CONSTRUCTION INDUSTRY ARBITRATION RULES
DEMAND FOR ARBITRATION

DATE: October 24, 1990

To: Name Foley Company
(of party upon whom the demand is made)
Address 7501 Front Street
City and State Kansas City, Missouri
ZIP Code 64120
Telephone (816) 241-3335 Fax (816) 241-4321
Name of Attorney _____
(if known)
Attorney's Address _____
City and State _____ ZIP Code _____
Telephone ( ) _____ Fax _____

The named claimant, a party to an arbitration agreement contained in a written contract, dated February 27, 1989, providing for arbitration under the Construction Industry Arbitration Rules, hereby demands arbitration thereunder.

(Attach the arbitration clause or quote it hereunder.)

SEE ATTACHMENT "A"

NATURE OF DISPUTE:

Moneys owing under contract, for additional work performed, and for delay damages.

CLAIM OR RELIEF SOUGHT: (amount, if any)
Monetary relief: $1,112,648.63

Please indicate the industry category of each party.

CLAIMANT: ___ Owner ___ Architect
___ Landscape Architect
___ Engineer___ Contractor
_x_ Subcontractor (specify tunnelling)
___ Interior Designer ___ Other _____

RESPONDENT: ___ Owner ___ Architect
___ Landscape Architect
___ Engineer _x_ Contractor
___ Subcontractor (specify ____)
___ Interior Designer ___ Other _____

HEARING LOCALE REQUESTED: Washington, D.C.
(City and State)

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Washington, D.C. Regional office, with the request that it commence the administration of the arbitration. Under the rules, you may file an answering statement after notice from the administrator.

Signed /s/ Robert J. Andrews Jr.
(May be signed by attorney)
Robert J. Andrews, Jr.
Title Attorney for Claimant
Name of Claimant S&M Constructors, Inc.
Address (to be used in connection with this case) 29100 Hall Street

City and State Solon, Ohio ZIP Code 44139
Telephone (216) 248-0376 Fax (216) 248-8248
Name of Attorney Andrews & Ryan
Attorney's Address 29100 Hall Street
City and State Solon, Ohio ZIP Code 44139
Telephone (216) 248-2009 Fax (216) 248-8248

To institute proceedings, please send three copies of this demand with the administrative fee, as provided for the rules, to the AAA. Send the original demand to the respondent.

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY Plaintiff, -vs- S&M CONSTRUCTORS, INC. Defendant.	)	CASE NO. CV90-032241

DEFENDANT'S ANSWER TO PLAINTIFF'S
APPLICATION TO STAY ARBITRATION

Now comes S&M Constructors, Inc. ("S&M") in response to Plaintiff's Application, pursuant to R.S.Mo. Section 435.355 and prays that this Court deny Plaintiff's Application to Stay Arbitration and prays for an order to compel arbitration. In support of this Answer, S&M states:

1. S&M is an Ohio corporation in good standing with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Upon information and belief, The Foley Co. ("Foley"), is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. S&M is a subcontractor of Foley for a United States Army Corps of Engineers project known as the Power Reliability Enhancement Program, Fort Ritchie, Maryland. The subcontract between S&M and Foley contains an Arbitration and Enforcement Cost Clause requiring that "disputes arising under this Agreement, or any

instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association." The arbitration clause requires any hearings to be held in Kansas City, Missouri. A copy of the subcontract and the arbitration clause are annexed hereto as Exhibit "A".

4. As a result of numerous irreconcilable disputes between S&M and Foley, S&M filed a demand for arbitration that is currently before the American Arbitration Association, Kansas City, Missouri.

5. The American Arbitration Association, by letter dated November 26, 1990, requested the parties to choose arbitrators and requested Foley to file its Answer and any counterclaim by December 6, 1990. A copy of the letter of the American Arbitration Association is annexed hereto as Exhibit "B".

6. Foley responded to the American Arbitration Association by letter dated December 5, 1990 that transmitted Foley's Answer and Counterclaim in the arbitration styled S&M Constructors, Inc. and the Foley Company, Case No. 57 110 0079 90 as well as a copy of its Application to Stay Arbitration filed with this Court. A copy of the transmittal letter and Answer and Counterclaim of Foley are annexed hereto as Exhibit "C".

7. In its Application to Stay Arbitration, Foley states that the subcontract with S&M provides, in Attachment 5, Schedule D, paragraph 1, that "all the various contract documents between the Owner and the Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis*

mutandis, The Foley Company Co. and Subcontractor." See Exhibit "A", Attachment 5.

8. Foley maintains that the incorporation by reference language of Attachment 5, Schedule D, Paragraph 1 incorporates into the subcontract the "disputes" clause contained in the prime contract between the United States Army Corps of Engineers and Foley, which disputes clause is binding upon S&M as subcontractor.

9. Similarly, Foley maintains that S&M is bound by the provisions of the prime contract governing "Changes," which dictates a procedure for the assertion of cost increases or changes in time of performance.

10. It is Foley's contention that the Disputes and Changes clauses of its contract with the United States Army Corps of Engineers, by virtue of their incorporation by reference, are the sole dispute resolution provisions available to S&M.

11. Foley's interpretation of the incorporation by reference of the terms of the prime contract is at odds with the plain language of the subcontract between Foley and S&M, which states that "disputes arising under *this Agreement*, or under any instrument made to carry out the terms of this Agreement, *shall* . . . be submitted to *arbitration*. . . . " [Emphasis Supplied] Through its incorporation by reference, the prime contract is part of the subcontract and as is clear from the foregoing, disputes arising under this Agreement, including any disputes with respect to the interpretation and application of the disputes and changes clauses, are subject to arbitration.

12. Foley, as the drafter of the contract, made no reservation or limitation under the arbitration clause with respect to the disputes or changes clauses of its prime contract. Therefore, it must be bound by the terms of its agreement with S&M to subject all disputes to arbitration. At the least, the conflict between the provisions of the prime and subcontract constitute an ambiguity that must be construed against Foley as drafter. *Slotkin v. Wilmering*, 464 F.2d 418 (1972); *Eastmont Construction Co. v. Transport Mfg. & Equipment Co.*, 301 F.2d 34 (1962).

13. The American Arbitration Association requested comments by S&M's counsel to Foley's Application to Stay Arbitration, which comments set forth the foregoing arguments. A copy of the request for comments and response of S&M's counsel are annexed hereto as Exhibit "D".

14. By letter dated January 11, 1991, the American Arbitration Association stated in pertinent part:

> The American Arbitration Association, after reviewing the contentions of the parties and the arbitration agreement, has determined that an issue as to arbitrability exists which may be determined by an arbitrator.

A copy is annexed hereto as Exhibit "E".

15. The agreement to arbitrate contained in the S&M subcontract with Foley is controlling when viewed on the basis of both the plain meaning of the contract and in the context of Foley as the party drafting the subcontract that contained the arbitration clause. This position is consistent with the view expressed by the Third Circuit Court of Appeals in *Sharon Steel Corp. v. Jewell*

Coal & Coke Co., 735 F.2d 775, 778-779 (3rd Cir. 1984). The Court held that "so long as the appellate's claim of arbitrability was plausible, interpretation of the contract should have been passed on to the arbitrator." *See, e.g., Pearl St. Development Corp. v. Conduit & Foundation Corp.*, 41 N.Y.2d 167, 391 N.Y.S.2d 98 (1976); *East Bernadino Cty. Water Dist. v. City of San Bernadino*, 109 Cal. Rptr. 510 (1973).

16. S&M requests that this Court find an agreement to arbitrate between the parties and thereby allow this matter to be resolved by arbitration before the American Arbitration Association.

WHEREFORE, Defendant S&M Constructors, Inc. prays that this Honorable Court deny Plaintiff's Application to Stay Arbitration and enter its Order requiring Plaintiff, The Foley Company, to arbitrate.

KRAFT, BROWER, GORDON and ZELDIN

By: /s/ Ronald L. Kraft
Ronald L. Kraft – MO #21382
Attorney for Defendant
9237 Ward Parkway, Suite 200
P.O. Box 33156
Kansas City, MO 64114-0156
Telephone (816) 361-4800
Fax (816) 361-9865

OF COUNSEL

Robert J. Andrews, Jr.
Andrews & Ryan
29100 Hall St.
Solon, Ohio 44139
(216) 248-2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Answer to Plaintiff's Application to Stay Arbitration was served by courier service this 18th day of February, 1991, on:

Mr. Kevin E. Glynn
and Mr. William J. DeBauche
NIEWALD, WALDECK & BROWN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105

/s/ Ronald L. Kraft
Ronald L. Kraft
Attorney for Defendant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY, Plaintiff, vs. S&M CONSTRUCTORS, INC., Defendant.	)))))))	Case No. CV90-32241 Civil B (Filed Sep. 27 1991)

PLAINTIFF'S STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW plaintiff, the Foley Company, by and through its counsel; and dismisses its Application to Stay Arbitration without prejudice.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
Telephone (816) 471-7000
Telecopier (816) 474-0872

/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR PLAINTIFF
THE FOLEY COMPANY

I hereby certify that a
true and correct copy of
the above and foregoing was
served by telecopier this
27 day of
SEPTEMBER, 1991 to:

Ronald Kraft
Kraft, Brower, Gordon
and Zeldin
9237 Ward Parkway, Suite 200
Kansas City, Missouri 64114

Robert Andrews
Andrews and Ryan
21900 Hall Street
Solon, OH 44139
Attorneys for Defendant
S&M Constructors, Inc.

/s/ William J. DeBauche
Attorneys for Plaintiff
The Foley Company

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY, Plaintiff, vs. S&M CONSTRUCTORS, INC., Defendant.	)	Case No. CV90-32241 Civil B

ORDER

The Court has reviewed plaintiff's Stipulation of Dismissal Without Prejudice. The Court hereby dismisses plaintiff's Application to Stay Arbitration without prejudice, with each party to bear its own costs.

/s/ Gene R. Martin
Judge

Date: September 27, 1991

Copies to:

Kevin E. Glynn
Ronald Kraft
Robert Andrews

AMERICAN ARBITRATION ASSOCIATION

S & M CONSTRUCTORS, INC.

and

THE FOLEY COMPANY

Case No.
57 110 0079 90

THE FOLEY COMPANY'S ANSWER AND AMENDED COUNTERCLAIM

COMES NOW the Foley Company and for its Answer and Amended Counterclaim, states:

1. Foley denies all of the allegations of S & M's Demand for Arbitration.

2. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. S & M is an Ohio corporation with its offices at 29100 Hall Street, Solon, Ohio 44139.

4. S & M entered into a subcontract with Foley on a project for the United States Corps of Engineers known as Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the project").

5. In the course of S & M's performance of its subcontract with Foley on the Project, S & M failed to perform its subcontract properly as (a) S & M was delinquent in its performance on the submittals which were required before initiation of work activity, (b) S & M started its performance on the Project behind the schedule which they had provided, (c) S & M failed to perform its work in a timely fashion in accordance with the requirements of

the contract and in accordance with the approved schedule; (d) S & M failed to pay its subcontractors and suppliers, including amounts which Foley paid to S & M for payment by S & M to those subcontractors and suppliers, and (e) S & M's work has been defective and deficient and not in conformance with the contract requirements, among other failures of performance by S & M.

6. As a result of S & M's delays, its defective, deficient and non-conforming work, and its failures to pay its subcontractors and suppliers, among other failures of performance by S & M, S & M has breached its subcontract with Foley, has been negligent in the performance of its subcontract, and in addition, S & M has failed to comply with the indemnity clause in its subcontract with Foley.

7. As a result of all of these failures by S & M, Foley has sustained damages as set forth on Exhibit A, which is attached. These damages are based on a projected completion date of January 25, 1992, and may be adjusted if the project is completed on a different date.

WHEREFORE the Foley Company denies all of the allegations of S & M Constructors, Inc.'s Demand for Arbitration and prays that S & M Constructors, Inc. may recover nothing on its Demand for Arbitration, and the Foley Company prays for an award of damages on its Counterclaim against S & M Contractors, Inc. in an amount of $2,359,849.12, based on a projected completion

date of January 25, 1992, and for all costs, and for any other relief which this panel may deem appropriate.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 471-7000

/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR THE
FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 16 day of DECEMBER, 1991 to:

Robert J. Andrews, Jr.
Andrews and Ryan
21900 Hall Street
Solon, Ohio 44139
Attorneys for S & M Constructors

/s/ William J. DeBauche
Attorneys for the Foley Company

EXHIBIT A

SUMMARY OF DAMAGES

Subcontractors Cost	
Pioneer Electric, Inc.	116,280.08
ACandS	1,817.00
W. C. Wiedenmann & Sons	29,826.00
D. L. George & Sons	64,132.26
Foley Company	
Smoke-outs	5,832.54
Overexcavation Keyway Barrier "C", Substation Invert, Reservoir Bottom, "B" Invert, "C" Invert, "F" Invert	53,722.02
Scaling Areas "C" & "D"	12,228.79
Scaling Areas "B", "E" & "F"	15,529.19
Remove Fan Line Area "C"	605.27
Correct Wet Zones Area "G"	1,585.89
Overtime-Acceleration	25,479.73
Overexecavation in Area "G"	82,081.05
Overexcavation – At Cooling Towers	29,397.58
Assist S & M Coring Shotcrete	475.44
Install Chainlink Area "D"	2,586.38
Tight Removal Barrier "B", Intersection "F" & "G", Sump Area "G"	3,720.00
Assist S&M Remove Tights & Grout Voids	18,597.24
Engineering Error in "F"	30,620.98
Test Rock Bolts & Replace Deficient Bolts	3,389.59
Cleanup & Dispose of Contaminated Oil & Soil	1,210.00
Scheduling	4,000.00
Consulting Fees	20,000.00
Attorney Fees	46,578.08
Extended Field Overhead	426,579.27
Extended Home Office Overhead	222,272.00

Liquidated Damages	350,300.00
Performance Cost Increase	576,471.00
Subtotal	2,145,317.38
Profit	214,531.74
Total	$2,359,849.12

AMERICAN ARBITRATION ASSOCIATION

S & M CONSTRUCTORS, INC.

AND Case No. 57 110 0079 90

THE FOLEY COMPANY

THE FOLEY COMPANY'S STATEMENT OF FACTS

The Foley Company's Amended Counterclaim against S & M Constructors arises from S & M's delays and deficient and nonconforming work performed on its subcontract with Foley, the general contractor, on a project known as the Alternate Joint Communications Center, a military installation in Pennsylvania. The contract was administered by the U.S. Army Corps of Engineers from its Fort Ritchie, Maryland office.

The project site contains national alternative communication centers in hardened facilities for the Department of Defense, built into a mountain about seventy-five miles from Washington, D.C. The project at issue in this arbitration involved enlarging and modernizing the center and enhancing the reliability of the mechanical systems. Foley's contract involved increasing the size of the facility by constructing additional tunnels and work rooms. Much of the work took place in new areas of the mountain not previously excavated or blasted. S & M entered into a subcontract with Foley to perform blasting, excavation and tunneling work. Foley Company performed the general and mechanical construction following S & M's work.

A summary of Foley's claims against S & M are contained on Exhibit A to Foley's Amended Counterclaim. Foley's damages caused by S & M total $2,359,849.12, assuming a completion date of January 25, 1992.

S & M's performance of its subcontract was deficient from the beginning, as S & M was delinquent in transmitting submittals which were requisite prior to the initiation of work activity. S & M commenced its performance behind the schedule which it had provided. S & M's performance was deficient in many other instances as the work progressed, so that Foley sustained 310 days of delay to its work on the project as a result of S & M's delinquent and deficient performance. The Corps of Engineers has assessed liquidated damages against Foley at a cost of $1,150.00 per day, for a total of approximately $350,000.00 in liquidated damages assessed against Foley as a result of S & M's delinquent and deficient performance.

S & M's performance of its tunneling work was defective, deficient and not in conformance with the contract documents. S & M overexcavated many areas on the project, including the tunnel inverts in Areas B, C and F; the cooling tower and heat exchanger foundations located in Area B; the keyway at the blast barrier in Area C; the electrical substation invert, the reservoir bottom; and the Mechanical Room in Area G. In addition, S & M was responsible for an error in the elevation of Tunnel F. The contract documents contained specific limits for excavation, which S & M consistently breached.

As a result of S & M's excavation errors in many areas, Foley Company in its subsequent performance of the general and mechanical construction work was forced to incur additional costs and delays because of Foley's need to perform additional work to make up for S & M's excavation errors.

The Corps of Engineers would not accept S & M's shotcrete work in Area G, as S & M did not properly control the wet zones in that area during construction. The Corps would not accept the work until the wet zones were properly abated. S & M refused to perform this work, which was required by its subcontract, and Foley was forced to perform it for S & M.

The Corps of Engineers also found S & M's work in several areas unacceptable with regard to the scaling of rock from the invert to the apex. The Corps would not permit any following work to be performed in these areas for safety reasons. S & M refused to perform this scaling work in a manner acceptable to the Corps. Foley performed S & M's scaling work for S & M to keep the job from being further delayed.

S & M also caused Foley to incur costs and time delays due to smoke outs caused by S & M's failure to comply with the contract requirements for temporary utilities. Noxious smoke and fumes emanated from existing tunnels and vent shafts, and the Corps found that this problem was caused by S & M's failure to perform its work in accordance with the contract.

Foley has also learned that S & M failed to pay some of its suppliers and subcontractors, even though Foley

had paid S & M for the pay estimates for the time frame when those costs were incurred.

The contract between Foley and S & M allows Foley to charge its consulting fees and attorney's fees for this proceeding to S & M, and these amounts are included in Exhibit A.

Foley has also charged extended overhead in accordance with the formulas approved by the Courts. Foley has charged S & M for the liquidated damages which the Corps has charged Foley and which are attributable to S & M's delays. The excessive period of delay caused to Foley by S & M's breaches and failures caused Foley to incur performance cost increases in several areas and these costs are included on Foley's Exhibit A as well.

Exhibit A contains other items which Foley will explain in full at the arbitration. In this Statement, Foley has presented the arbitrators with many of the most significant delays and costs caused by S & M.

Foley believes that it owes nothing on S & M's claim, as S & M is seeking relief for areas of work in which S & M performed deficient and non-conforming work and in which S & M delayed Foley's work. Further, Foley has expended significantly more money to perform and correct S & M's work than S & M contends remains as unpaid contract balances. The amount withheld by Foley

is a great deal less than the costs caused to Foley by S & M's delays and deficient and non-conforming work.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 471-7000

/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR THE
FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 16 day of January, 1991 to:

Robert J. Andrews, Jr.
Andrews and Ryan
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125
Attorneys for S & M Constructors
/s/ William J. DeBauche
Attorneys for The Foley Company

AMERICAN ARBITRATION ASSOCIATION

S&M CONSTRUCTORS, INC.

and Case No. 57 110 0079 90

FOLEY COMPANY

PRE-HEARING STATEMENT OF S&M CONSTRUCTORS, INC.

S&M Constructors, Inc. ("S&M") and Foley Company ("Foley") entered into a subcontract dated February 27, 1989 in the amount of $5,200,000.00 for the performance of certain excavation and shotcreting work at the Power Reliability Enhancement Program (AJCC) ("Project") Fort Ritchie, Maryland. Foley was the prime contractor for the Project under Contract No. DACA31-89-C-0008 which contract was incorporated by reference into the S&M subcontract.

From the outset of the Project, S&M experienced numerous delays in the commencement and conduct of its work, and performed work in excess of contract requirements. These delays and extra work have been due solely to the failure of the Government and/or Foley to perform in accordance with the terms and specifications of the primary contract and hence the S&M/Foley subcontract. By the terms of the subcontract agreement, the obligations of the Government are assumed towards S&M by Foley.

Foley has withheld payment from S&M in the amount of $297,215.75 which is owing by Foley to S&M under its subcontract, and has refused to compensate S&M for its expenses incurred as a direct result of these

delays, and certain requirements for equipment rentals and for extra work. As a result, S&M has made a demand for arbitration pursuant to Attachment 5, Schedule D of the subcontract seeking monetary relief in the amount of $1,112,648.63. Of the monetary relief sought, $297,215.75 represents amounts wrongly withheld by Foley under the subcontract and $815,432.88 represents compensation sought for delays relating to security clearance, additional work and changed conditions.

Under the terms and specifications of the prime contract, certain areas of the Project were "restricted" and required security clearance for all personnel working in such areas. Specifically, the prime contract under Part IV, Section L – Instructions, Conditions and Notice to Bidders stated under L.28

Security Conditions Affecting Work:

> Some of the work required by this solicitation may require access to restricted areas. Occasional delay in obtaining authorization for access to these areas or escort to a work site may be anticipated.

No time period is set forth in the Fort Ritchie contract as required for obtaining security clearance. Before S&M's final schedule Foley/Government personnel represented that sixty (60) days should be scheduled and anticipated by the Contractor as required to obtain security clearances.

S&M, in reasonable reliance on such representations, diligently and timely applied for security clearances for its personnel but was unable to obtain security clearances for the requisite number of skilled workers to commence

and prosecute the work as scheduled. When S&M was able to commence work, it was forced to do so without the requisite number of supervisors and crew to perform the work as originally scheduled and as reasonably anticipated. At variance with its intended schedule but in order to begin to accomplish its work, S&M was forced to change its work schedule from three eight-hour shifts to two ten-hour shifts. This modification of its anticipated procedure, necessitated by the unjustified security clearance delays, and in contradiction to express representations made by upper-tier representatives, further delayed S&M's work due to the loss of efficiency caused by extended work shifts and made S&M's work more costly because of the greater utilization of premium time to enhance production.

The security clearance delays were well in excess of the 60 days represented as required, or – for that matter – any other reasonable standard, and interfered with the proper execution of S&M's work by limiting the number of skilled personnel available to the project. S&M seeks an equitable adjustment of its contract price and time for these delays on the basis of constructive change, Government/Foley furnished property, and failure to provide access to the work. It is S&M's contention that these are compensable, not just excusable, delays.

S&M is also seeking an equitable adjustment in contract price and time for directed changes for additional work performed to seal water leaks after the required shotcrete had been successfully applied. In addition, S&M is seeking equitable adjustment in contract price and time for changed conditions in the Area D Upshaft which constituted a delay to S&M's work. As a result of

the changed condition, new plans had to be formulated, and as a result, additional delays were suffered by S&M.

In all, S&M is seeking an equitable adjustment to its contract in the amount of $1,112,648.63 and 184 calendar days. These delays are at the heart of the arbitration between S&M and Foley. S&M is seeking redress for the balance of its contract amount plus compensable extra work costs and extended delays, while Foley is seeking compensation for delays allegedly caused by S&M, lost performance and extended overhead relative to the delays, liquidated damages and for additional costs relative to the direct and indirect cost of repairs which Foley apparently claims were necessitated by S&M's failure properly to perform its work. In total, Foley is seeking $2,359,849.12 in its Counterclaim.

Certain components of Foley's claim are inconsistent. Assuming, arguendo, that S&M's delays are found not to be either compensable or excusable, Foley is not entitled to *both actual and liquidated* damages for delays caused by S&M. Rather, Foley would be limited to the contract provisions calling for liquidated damages. Moreover, certain of Foley's claims relating to overexcavation are necessary construction costs, and part of the inherent risk, assumed by Foley when it deleted from S&M's proposed scope of subcontract work, and decided to take upon itself, the obligation to perform the concrete work following excavation. Foley was warned by S&M representatives that the work deleted was more expensive than Foley anticipated because of the impossibility (understood by everyone familiar with underground construction – which Foley was not) of precisely controlling the manner in which rock breaks in blasting. It is Foley's

contention that S&M improperly excavated in certain areas, causing Foley additional expense. In fact, S&M employed industry standard techniques to control break as appropriate and practicable. Nevertheless, the rock breakage, an inevitable concomitant of the drill-and-blast method, is ultimately a function of geology.

While there are other numerous specific areas of dispute to be determined in this proceeding, S&M's basic position is that Foley cannot impose upon S&M the responsibility for delays that are actually compensable to S&M and which resulted from causes attributable solely to Foley and/or the Government as a result of Foley and/or the Government's failure properly to understand or schedule its own work.

Respectfully submitted,

ANDREWS & ASSOCIATES

JANUARY 16, 1992

/s/ Robert J. Andrews, Jr.
ROBERT J. ANDREWS, JR.
Regis. No. 0025043
4403 St. Clair Avenue
Cleveland, OH 44103-1125
(216) 881-8030

Attorney for Claimant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

S&M CONSTRUCTORS, INC. Plaintiff, v. THE FOLEY COMPANY, Defendant.	)	CV92-1585 Case No. Division (Filed Jan. 23, 1992)

PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW plaintiff S&M Constructors, Inc. ("S&M") and prays for judgment ordering a temporary restraining order of the arbitration proceedings between S&M and The Foley Company ("Foley"), Case No. 57 110 0079 90, before the American Arbitration Association, Kansas City, Missouri, scheduled to commence February 3, 1992, and that a preliminary injunction be issued thereafter, enjoining such arbitration. In support of its Petition S&M states:

1. S&M is an Ohio corporation in good standing with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Foley is a Missouri corporation in good standing with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. The dispute in arbitration arose under S&M's subcontract with Foley for excavation and other heavy underground construction services rendered at United States Army Corps of Engineers ("Corps of Engineers")

project known as the Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland ("Project") for which Foley was the general contractor.

4. S&M and Foley have filed claims with the Corps of Engineers for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for S&M's personnel in a timely manner, for changed conditions and for additional work, which claims aggregate in excess of $2,000,000. To date, the Contracting Officer for the Project has not made a final determination of these claims.

5. In the scheduled arbitration proceedings, S&M has made a demand against Foley for the same claims for equitable adjustment as set forth in paragraph 4.

6. Foley has filed a counterclaim in the arbitration proceedings seeking $2,359,849.12 for losses and extra expense caused by S&M's delays substandard performance of its subcontract with Foley. Foley contends that S&M's delays in turn have delayed and impacted Foley's scheduling and completion of the Project in a timely manner.

7. The delays for which Foley is basing its counterclaim are, for the most part, concurrent with the delays that are the basis of S&M's claim for equitable adjustment, and, similarly are based on commissions or omissions on the part of the United States Government.

8. The subcontract between S&M and Foley has caused a unique and conflicting situation based on the contradictory terms of the subcontract governing dispute

resolution. The S&M-Foley subcontract provides in Attachment 5, Schedule D, paragraph 1 as follows:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis,* The Foley Co. and Subcontractor.
>
> Exhibit A annexed hereto.

Foley's contract with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which requires that "all disputes arising under or relating to this contract shall be resolved under this clause." A copy of this Disputes clause is annexed hereto as Exhibit B. The Disputes clause requires that any claims must first be submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, which decision shall be final unless the contractor appeals or files suit under the Contracts Disputes Act 41 U.S.C. Sections 601-613.

9. In addition to the Disputes clause which is incorporated by reference into the subcontract between S&M and Foley, the subcontract provides in Attachment 5, Schedule D, paragraph 2, as follows:

> 2. Arbitration and Enforcement Costs – It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, MO. Any costs

> including, without limitation, legal fees incurred by either party in the successful enforecement of any rights hereunder, shall be borne by the party against which said rights are enforced.
>
> Exhibit A annexed hereto.

10. The foregoing arbitration clause is the basis for the arbitration proceedings scheduled to commence on February 3, 1992 in Kansas City, Missouri.

11. The conflict that arises by virtue of the contradictory provisions for dispute resolution contained in Attachment 5 of the subcontract is that a bifurcated proceeding has resulted. First, S&M has made its claims, as has Foley, through the Government contract mandated disputes resolution process, for equitable adjustment based on compensable delays, additional work and changed conditions for which claims a determination has not yet been made. Second, the arbitration proceeding involves claims identical with those claimed for in accordance with the Government contract mandated disputes resolution process. Third, the counterclaims asserted by Foley in the arbitration are similarly identical with those Foley has submitted in accordance with the Government contract mandated disputes resolution process and are integrally tied to a determination of the validity of S&M's claims relating to delays which may either be compensable or excusable delays and therefore a valid defense to Foley's counterclaims.

12. The result of commencing arbitration at this time could be conflicting results that would be inequitable to the parties by failing to provide a means by which to redress these conflicts. By way of example, S&M could

prevail in the arbitration, winning its award and defeating Foley's counterclaim, yet Foley could lose its claim before the Corps of Engineers or Board of Contract Appeals which may find Foley is not entitled to additional compensation and that its delays (which would include S&M's) were neither compensable nor excusable. In this instance, Foley would have no means of redress because of the inherent limitation on the appeal of arbitration awards. Similarly, S&M might prevail before the Corps of Engineers or the Board of Contract Appeals with a finding that its delays were compensable, yet lose in arbitration and would have no means to reconcile its position. Such a potential conflicting result indicates that the issues are not yet ripe for arbitration.

13. In addition to the issue of potentially irreconcilable results, S&M maintains that the current arbitration proceeding must be enjoined based on the preemption of federal procurement.

14. The Project as well as Foley's contract with the Corps of Engineers is governed by federal government procurement law which dictates the means and methods of dispute resolution. By virtue of the incorporation of Foley's contract into S&M's subcontract, the dispute resolution mechanism dictated by Government regulations are controlling and preempt the consensual provisions of the subcontract relating to arbitration. Such a determination is clearly required where, as in the instant case, the parties have submitted their disputes for resolution by the Corps of Engineers Contracting Officer pursuant to the Disputes clause of the prime contract.

15. S&M maintains that should arbitration proceed, such proceedings would be in violation of federal law governing dispute resolution for government contracts and that S&M, and indeed Foley, may sustain irreparable harm resulting from conflicting decisions by the Corps of Engineers and the arbitration for which result S&M has no adequate remedy at law.

WHEREFORE, plaintiff S&M respectfully prays that:

A. This Court, by its order, temporarily restrain the defendant from proceeding to arbitration before the American Arbitration Association in Case No. 57 110 0079 90.

B. This Court, by its order, preliminarily enjoin the defendant from proceeding to arbitration before the American Arbitration Association in Case No. 57 110 0079 90.

C. This Court grant such further relief as it deems just and proper.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZELDIN

By: /s/ Ronald L. Kraft
Ronald L. Kraft – MO #21382

By: /s/ Robert B. Zeldin
Robert B. Zeldin – MO #22372
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC. 29100 Hall Street Solon, Ohio 44139 Plaintiff -vs- THE FOLEY COMPANY 7501 Front Street Kansas City, Missouri 64120 Defendant	CASE NO. JUDGE (Filed Feb. 14, 1992) 92-0142-CV-W

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes Plaintiff S&M Constructors, Inc. ("S&M") pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and moves this Court for a temporary restraining order to prevent Defendant The Foley Company ("Foley") from proceeding to arbitration with S&M in Case No. 57 110 0079 90 before the American Arbitration Association, Kansas City, Missouri, which was originally scheduled to commence February 3, 1992. In support of its Motion, S&M states:

1. S&M is an Ohio corporation in good standing, with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri.

3. Jurisdiction is predicated upon both diversity of citizenship within the terms of 28 U.S.C. §1332 and Federal subject matter jurisdiction under the Federal

Arbitration Act, 9 U.S.C. §1 *et seq.* and the Contracts Dispute Act of 1978, 41 U.S.C. §601 *et seq.*

4. The dispute between the parties arose out of S&M's subcontract with Foley for excavation and other heavy underground construction services rendered at United States Army Corps of Engineers ("Corps of Engineers") project designated as the Power Reliability Enhancement Program (AJCC) ("Project"), Fort Ritchie, Maryland.

5. Foley is the general contractor for the Project under the prime contract with the Corps of Engineers and contracted with the United States Government for all construction aspects of the Project.

6. The S&M-Foley subcontract provides in Attachment 5, Schedule D, paragraph 1:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and subcontractor.
>
> [Exhibit A annexed hereto.]

7. Foley's prime contract with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which states that "this contract is subject to the Contracts Disputes Act of 1978, (414 S.C. 601-613)" and which requires that "all disputes arising under or relating to this contract shall be resolved under this clause." A copy of this Disputes clause is annexed hereto as Exhibit B. The Disputes clause requires that any claims

must first be submitted to the Corps of Engineers Contracting Officer for a written decision, which decision shall be final unless the contractor appeals to the Board of Contract Appeals or files suit in the Claims Court under the Contracts Dispute Act of 1978, 41 U.S.C. §601 *et seq.*

8. Whereas the Disputes clause of the prime contract is incorporated by reference into the S&M-Foley subcontract, the subcontract also provides in Attachment 5, Schedule D, paragraph 2:

> 2. Arbitration and Enforcement Cost. It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, Missouri. Any costs including without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.
>
> [Annexed hereto as Exhibit A.]

This arbitration clause is the basis for the pending arbitration proceeding.

9. In accordance with the Disputes clause of the prime contract between Foley and the Corps of Engineers, S&M, through Foley, has filed claims with the Corps of Engineers for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for S&M's personnel in a timely manner and for other reasons; Foley has additional claims against the government which

aggregate in excess of $2,000,000.00. S&M's claims are and Foley's claims are soon to be before the Contracting Officer for the Project and have not yet been decided.

10. S&M's demand against Foley in the arbitration proceeding is for the same claims for equitable adjustment as in S&M and Foley's claims against the Government. Foley has filed a counterclaim in the arbitration seeking $2,359,849.22 for losses and extra expense caused by S&M's delays and for its substandard performance under the S&M-Foley subcontract.

11. Foley's counterclaim is based on the premise that S&M's delays have delayed and obstructed Foley's scheduling and have, therefore, prevented Foley's completion of the Project in a timely manner.

12. The delays upon which Foley is basing its counterclaim are, for the most part, concurrent with the delays that are the basis of the S&M and Foley claim for equitable adjustment submitted to the Contracting Officer, and, thus, are based on commissions or omissions of the United States Government. The United States Government, which would not be party to an arbitration between Foley and S&M, is thus a necessary party whose presence is required properly to resolve nearly all of the disputes between the parties. Foley itself recognized this fact when on December 6, 1990 it filed its own Application to Stay Arbitration in the Circuit Court of Jackson County, Missouri at Kansas City.

13. The dispute between S&M and Foley raises a question of the conflict between Federal law governing the government procurement process and dispute resolution thereunder and the subcontract arbitration clause. It

is S&M's position that i) the Disputes clause and dispute resolution remedies under the United States Government procurement law and the Contracts Disputes Act of 1978 preempt consensual remedies such as arbitration, ii) there has been an election to proceed under the Disputes clause and the parties have not exhausted their administrative remedies thereunder and, iii) Federal law governing government contracts is controlling to stay arbitration in this instance.

14. The failure to issue a temporary restraining order will cause irreparable harm to S&M since it will then be committed to concurrent bifurcated proceedings a) under the Disputes resolution process before the Corps of Engineers and b) pursuant to arbitration. Such a decision creates duplicative effort and results which may be inconsistent with judicial or legal economy and result in inconsistent and irreconcilable decisions.

15. Both S&M and Foley have claims within the Disputes resolution process mandated by Foley's prime contract with the Corps of Engineers and both seek equitable adjustment based on compensable damages, additional work and changed conditions.

16. With respect to S&M, the arbitration proceeding involves claims identical to those subject to resolution under the Disputes resolution process mandated by the prime Government contract.

17. Foley's counterclaims in arbitration are generally identical with the claims Foley has submitted under the prime contract's Disputes clause and are integrally tied to a determination of the validity of S&M's claims relative to delays which may either be compensable or

excusable delays, and therefore, a valid defense to Foley's counterclaim.

18. The consequence of commencing arbitration at this time could be conflicting results that would be inequitable to the parties by failing to provide a means to redress these conflicts.

19. Such conflicting results would do irreparable harm to S&M in the event S&M prevailed in one forum but lost in another since there is no means to reconcile these positions and awards in arbitration are effectively unappealable.

20. The construction of subcontracts let under a prime contract with the Government is governed by Federal law. *American Pipe & Steel Corp. v. Firestone Tire & Rubber*, 292 F.2d 640 (9th Cir. 1961).

21. When, as in the instant case, there is a conflict of policy between the dispute resolution process mandated by the prime government contract and alternative means of dispute resolution, Federal law has favored the Federal Dispute resolution process or mechanism. *See, Grinnell Fire Protection Systems Co., Inc. v. Regents of the University of California*, 554 F.Supp. 495 (N.D. Cal. 1982); *cf Bache Halsey Stuart, Inc. v. French*, 425 F.Supp. 1231 (D.D.C. 1977).

22. By incorporating the Disputes Clause of the prime contract into the subcontract and by exercising their rights thereunder, Foley and S&M have elected that the Disputes clause and the Contract Disputes Act of 1978 is their rightful and primary avenue of redress. Once there has been a final decision rendered pursuant to the

Government contract dispute resolution process, any remaining matters which do not involve the government may be resolved in accordance with the arbitration clause of the subcontract. Clearly, the dispute between S&M and Foley is not, at this juncture, ripe for arbitration.

23. Upon the granting of S&M's request for a temporary restraining order, S&M shall file an application to this Court for a Preliminary Injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

WHEREFORE, plaintiff S&M Constructors, Inc. prays that this Court grant its request for a temporary Restraining Order staying defendant The Foley Company from proceeding to arbitration.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZEDLIN

By: /s/ Ronald L. Kraft
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Of Counsel:

Robert J. Andrews, Jr.
Andrews & Associates
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125

STATE OF OHIO)
) SS.:
COUNTY OF CUYAHOGA)

VERIFICATION

I, Ronan S. Marra, declare as follows:

I am Vice President of S&M Constructors, Inc. Plaintiff in the above captioned action and make this declaration on behalf of Plaintiff in my capacity as Vice President of Plaintiff.

I have read the foregoing Motion for Temporary Restraining Order and know its contents. I am informed and believe that the matters stated in the Motion are true, and on that ground allege that the matters stated in it are true.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of February, 1992 at Cleveland, Ohio.

/s/ Ronan S. Marra
RONAN S. MARRA

SUBSCRIBED AND SWORN to before me, a Notary Public this 12th day of February, 1992.

/s/ Charles H. Manning
Notary Public

CHARLES H. MANNING, ATTORNEY
NOTARY PUBLIC, State of Ohio
My Commission Has No Expiration Date

IN THE COURT OF APPEALS
EIGHTH CIRCUIT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC.	:	Case No.
Plaintiff-Appellant	:	92-0142-CV-W-6
	:	
-vs-	:	JUDGE
	:	
FOLEY COMPANY	:	
	:	MOTION FOR
Defendant-Appellee	:	TEMPORARY STAY
	:	OF ARBITRATION
	:	WHILE MOTION TO
	:	ENJOIN A DISTRICT
	:	COURT ORDER IS
	:	PENDING
	:	

Now comes the Plaintiff-Appellant, S&M Constructors, Inc., by and through counsel, and respectfully requests that this Honorable Court issue a one week injunction of an order denying Plaintiff-Appellant's Motion to Stay Arbitration and issue an Order to Stay Said Arbitration Pending Appeal.

This motion is being made pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Counsel has previously moved for a stay in District Court. Counsel has also moved for an injunction by this Court of the District Court Order Pending Appeal which is attached hereto. The District Court denied counsel's application, and with an arbitration set for February 25, 1992, it is necessary to obtain an order staying arbitration while the motion and the appeal are pending. The reasons supporting the

granting of this motion are set forth in the following brief.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZEDLIN

/s/ Ronald L. Kraft
RONALD L. KRAFT
(MO Regis. 21382)
Attorney for Plaintiff-Appellant

IN THE COURT OF APPEALS
EIGHTH CIRCUIT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC.	:	Case No. 92-0142-CV-W-6
Plaintiff-Appellant	:	
-vs-	:	JUDGE
FOLEY COMPANY	:	
Defendant-Appellee	:	MOTION TO STAY AN ORDER OF THE DISTRICT COURT PENDING APPEAL AND FOR AN IMMEDIATE AND TEMPORARY INJUNCTION STAYING PROCEEDINGS PENDING APPEAL

Now comes the Appellant, S&M Constructors, Inc., by and through counsel, and respectfully requests that this Honorable Court stay the order denying its Motion to Stay Arbitration while the order is challenged on appeal and grant an Immediate Temporary Injunction Staying Arbitration Pending Appeal.

This motion is being made pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Counsel previously moved for a stay in the Federal District Court. The District denied counsel's application and it is therefore necessary to stay the scheduled arbitration while this appeal

is pending. The reasons supporting the granting of this motion are set forth in the following brief.

Respectfully submitted,
KRAFT, BROWER, GORDON AND ZEDLIN

/s/ Ronald L. Kraft
RONALD L. KRAFT
(MO Regis. 21382)
Attorney for Plaintiff-Appellant

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(3)

No. 92-56

Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

S&M CONSTRUCTORS, INC.,
Petitioner,

v.

THE FOLEY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner's Supplemental Brief

ROBERT J. ANDREWS, JR., *Counsel of Record*
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 881-8030

and

CHARLES H. MANNING
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 881-8030
Counsel for Petitioner

22pp

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SUPPLEMENTAL BRIEF

Petitioner, S&M Constructors, Inc., submits this Brief to supplement its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. As noted in its Petition, the United States Court of Appeals for the Eighth Circuit denied Petitioner's motion for a stay of arbitration pending appeal in its opinion dated March 16, 1992 as set forth in Petitioner's Appendix at page A-1.

On March 18, 1992, Petitioner filed a Motion in the United States Court of Appeals for the Eighth Circuit to stay enforcement of the Court's decision pending an application to the United States Supreme Court for a Petition for Writ of Certiorari. The United States Court of Appeals denied Petitioner's Motion in its decision issued March 27, 1992.

Subsequently, the American Arbitration Association rescheduled the arbitration between Petitioner S&M Constructors, Inc. and Respondent The Foley Company for March 31, 1992. On March 30, 1992, prior to the commencement of the rescheduled arbitration between Petitioner and Respondent, Petitioner filed a Voluntary Petition in the United States Bankruptcy Court for the Northern District of Ohio under Chapter 11 of the Bankruptcy Code, Case No. 92-11872, which case is still pending. (The Voluntary Petition in Bankruptcy of S&M Constructors is reprinted in the Appendix.)

Pursuant to the automatic stay provisions of 11 U.S.C. §362, the scheduled arbitration between Petitioner and Respondent has been stayed during the pendency of Petitioner's Chapter 11 bankruptcy proceeding. Consequently, the parties have not commenced arbitration so as to render this Court's review of

Petitioner S&M Constructors, Inc. Petition for Writ of Certiorari moot.

Respectively submitted,
ROBERT J. ANDREWS, JR.
Counsel of Record

CHARLES H. MANNING
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 881-8030
Counsel for Petitioner

Chapter 11 92-11872

United States Bankruptcy Court Northern District of Ohio Eastern Division	VOLUNTARY PETITION
In re: S & M Constructors, Inc. An Ohio Corporation	Name of Joint Debtor
All other names used by the debtor in the last 6 years NONE	All other names used by the joint debtor in the last 6 years
Soc. Sec.#/TAX I.D.# 34-0941329	Soc. Sec.#/TAX I.D.#
Street address of debtor 29100 Hall St. Solon, Ohio 44139 County of Residence or business Cuyahoga	Street address of Joint Debtor County of Residence or Business
Mailing address of Debtor SAME	Mailing Address of Joint Debtor
Business Debtor's Principal Asset Location SAME	Venue [X] Debtor's domicile, residence, or business assets were in this District for the 180 days preceding this petition
INFORMATION REGARDING DEBTOR	Chapter/Section [X] Chapter 11 Filing Fee: [X] Attached
Debtor Type: [X] Corporation Not Public Debt Nature: [X] Business A. Business Type: [X] Construction B. Briefly describe nature of business Construction of underground tunnels	Name and address of law firm or attorney Irving S. Bergrin 1600 East Ohio Building Cleveland, Ohio 44114 Bar No. 0010100 Telephone No. (216) 579-4224 Attorney(s) representing debtor Irving S. Bergrin [ ] Debtor not represented by attorney
Statistical Administrative Information (28 U.S.C. 604) [X] Funds will not be available for unsecured creditors Estimated No. of Creditors: [X] 16-49 Estimated Assets (thousands): [X] Under 50 Estimated Liabilities (thousands): [X] 500-999 Estimated no. of Employees: [X] 0 Estimated Equity of Security Holders: [X] 0	This space for Court Use JUDGE SNOW RELIEF ORDERED Time stamped March 30, 1992

Debtor: S & M Constructors, Inc., an Ohio Corporation Case No. _____

FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only. [X] Debtor intends to file plan within time allowed.

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS

Location Where Filed	Case Number	Date Filed
NONE		

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THE DEBTOR

Name of Debtor	Case Number	Date
NONE		
Relationship	District	Judge

REQUEST FOR RELIEF

Debtor requests relief under the U.S. Code title 11 chapter specified in this petition.

SIGNATURES

Attorney

X /s/ IRVING S. BERGRIN Date: 3-24-92
Attorney: Irving S. Bergrin

JOINT DEBTORS	CORPORATE OR PARTNERSHIP DEBTOR
We declare under penalty of perjury that the information provided in this petition is true and correct X _____ Debtor: Date: X _____ Joint Debtor: Date:	I declare under penalty of perjury that the information in this petition is true and correct and that the filing of this petition on behalf of the debtor has been authorized. X /s/ RONAN MARRA Signature of Authorized Individual Name: Ronan Marra Title: Vice President Date: 3-24-92

EXHIBIT "A"

[X] Exhibit "A" is attached and made part of this petition.

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P. L. 98-353 S322)

I am aware that I may proceed under Chapter 7, 11, or 12, or 13 of title 11, U.S. Code understand the relief available under such chapter, and choose to proceed under chapter 7 of such title. If I am represented by an attorney Exhibit "B" has been completed.

EXHIBIT "B"

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, U.S. Code, and have explained the relief available under such chapter.

X _____ Date:

In re: S & M Constructors, Inc., an Ohio Corporation/Debtor
Case No.

SCHEDULE D — CREDITORS HOLDING SECURED CLAIMS

Creditor Name and Address	Date, Nature of Lien, Description & Value	Claim Amount	Unsecured Portion and Notes*

[X] Debtor has no creditors holding secured claims to report on this Schedule D.

In re: S & M Constructors, Inc., an Ohio Corporation/Debtor
Case No.

SCHEDULE E — CREDITORS HOLDING UNSECURED PRIORITY CLAIM
PRIORITY TYPE: Taxes and Certain Other Debts Owed to Governmental Units

Creditor Name and Address	Claim Date and Consideration	Claim Amount	Amount with Priority and Notes*
1. Account No. Francis Gaul, County Treasurer Real Property Tax 1219 Ontario St. Cleveland, OH 44113		Unknown	Unknown

Continuation sheet no. 1 of 1

Subtotal: $ 0.00
Total: $ 0.00

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE E — CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

[ ] Debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY

[ ] Extensions of credit in an involuntary case
Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or for the order relief. 11 U.S.C. S507(a)(2).

[ ] Wages, salaries and commissions
Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000.00 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(3).

[ ] Contributions to employee benefit plans
Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(4).

[ ] Certain farmers and fishermen
Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. S507(a)(5).

[ ] Deposits by individuals
Claims of individuals up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. S507(a)(6).

[X] Taxes and Other Certain Debts Owed to Governmental Units
Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. S507(a)(7).

1 Continuation sheet attached

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
1.	Account No. Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020	Misc.	$ 69,700.00
2.	Account No. Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020	Misc.	$182,000.00
3.	Account No. Al Mathews Corporation P.O. Box 4039 Federal Way, WA 98063	Misc.	$ 3,651.04
4.	Account No. American Arbitration Assn. 140 West 51st Street New York, NY 10020-1203	Misc.	$ 5,681.62
5.	Account No. Andrews & Associates 4403 St. Clair Cleveland, OH 44103-1125	None	$161,270.14
6.	Account No. Arnold L. Cornez 333 W. Maude Avenue, Suite 101 Sunnyvale, CA 94086	None	$ 1,457.00
7.	Account No. Arthur Andersen & Co. 1717 East Ninth Street Cleveland, OH 44114	None	$106,125.00
8.	Account No. Bell Atlantic Tricon Leasing P.O. Box 911 Paramus, NJ 07653	None	$ 387.30
		Subtotal:	$530,272.10

2 continuation sheets attached

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS — (Continuation Sheet)

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
9.	Account No. Britton Gallagher Insurance Ag 6240 SOM Center Road Cleveland, OH 44139	Credit card purchases	$ 31,249.00
10.	Account No. Burke, Rosen & Associates 2800 Euclid Avenue Cleveland, OH 44115	None	$ 1,675.00
11.	Account No. Commonwealth of Pennsylvania Office of Attorney General 15th Floor, Strawberry Square Harrisburg, PA 17120	None	$ 61,843.00
12.	Account No. D. L. George & Sons, Inc. 13321 Midvale Road Waynesboro, PA 17268	None	$ 62,753.12
13.	Account No. Frank I. Ciminelli Construction The Cyclorama Building 369 Franklin Street Buffalo, NY 14202-1790	None	$ 65,000.00
14.	Account No. 219-3138-85090 GMAC 24700 Chagrin Blvd. Beachwood, OH 44122	None	$ 2,110.07
15.	Account No. Hall Street Enterprise Company 29100 Hall Street Solon, OH 44139	None	$ 58,500.00
16.	Account No. J. A. Blanck Co. 1300 Watervale Road Fellston, MD 21047	None	$ 38,395.96
		Subtotal:	$321,526.15

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS — (Continuation Sheet)

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
17.	Account No. Jacobs Associates 500 Sansome San Francisco, CA 94111	None	$ 8,560.21
18.	Account No. Lachel & Associates, Inc. P.O. Box 4039 Golden, CO 80401	None	$ 6,884.56
19.	Account No. Lakeshore Mining Equipment Co. 4106 Earmoor Road Louisville, KY 40218	None	$ 8,961.16
20.	Account No. Longano Consultants, Inc. 4405 St. Clair Cleveland, OH 44103-1125	None	$ 3,227.20
21.	Account No. S. H. Bartholomew, Inc. P.O. Box 3360 Chico, CA 95927-3360	None	$ 8,458.82
		Subtotal:	$ 36,091.95
		Total:	$887,890.20

Sheet no. 2 of 2

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc., an Ohio Corporation* Case No.
Chapter 11
_____/Debtor

Attorney for Debtor: Irving S. Bergrin

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Following is a list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P 1007(d) for filing in this chapter 11 [or chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. 101(30), or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims.

Creditor & Contact	Nature of Claim	Amount of Claim
Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020 Phone:	Misc.	$182,000.00
Andrews & Associates 4403 St. Clair Cleveland, OH 44103-1125 Phone:	None	$161,270.14
Arthur Andersen & Co. 1717 East Ninth Street Cleveland, OH 44114 Phone:	None	$106,125.00
Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020 Phone:	Misc.	$ 69,700.00
Frank I. Ciminelli Construction The Cyclorama Building 369 Franklin Street Buffalo, NY 14202-1790 Phone:	None	$ 65,000.00

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Creditor & Contact	Nature of Claim	Amount of Claim
D. L. George & Sons, Inc. 13321 Midvale Road Waynesboro, PA 17268 Phone:	None	$ 62,753.12
Commonwealth of Pennsylvania Office of Attorney General 15th Floor, Strawberry Square Harrisburg, PA 17120 Phone:	None	$ 61,843.00
Hall Street Enterprise Company 29100 Hall Street Solon, OH 44139 Phone:	None	$ 58,500.00
J. A. Blanck Co. 1300 Watervale Road Fellston, MD 21047	None	$ 38,395.96
Britton Gallagher Insurance 6240 SOM Center Road Cleveland, OH 44139	Credit card purchases	$ 31,249.00
Lakeshore Mining Equipment Co. 4106 Earmoor Road Louisville, KY 40218 Phone:	None	$ 9,961.16
Jacobs Associates 500 Sansome San Francisco, CA 94111 Phone:	None	$ 8,560.21

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Creditor & Contact	Nature of Claim	Amount of Claim
S. H. Bartholomew, Inc. P.O. Box 3360 Chico, CA 95927-3360 Phone:	None	$ 8,458.82
Lachel & Associates, Inc. P.O. Box 4039 Golden, CO 80401 Phone:	None	$ 6,884.56
American Arbitration Assn. 140 West 51st Street New York, NY 10020-1203 Phone:	Misc.	$ 5,681.62
Al Mathews Corporation P.O. Box 4039 Federal Way, WA 98063 Phone:	Misc.	$ 3,651.04
Longano Consultants, Inc. 4403 St. Clair Cleveland, OH 44103-1125 Phone:	None	$ 3,227.20
GMAC 24700 Chagrin Blvd. Beachwood, OH 44122 Phone:	None	$ 2,110.07
Burke, Rosen & Associates 2800 Euclid Avenue Cleveland, OH 44115 Phone:	None	$ 1,675.00
Arnold L. Cornez 333 W. Maude Avenue, Suite 101 Sunnyvale, CA 94086 Phone:	None	$ 1,457.00

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS
(Continuation Sheet)

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION

I, Ronan Marra, Vice President of the Corporation named as debtor in this case, declare under penalty of perjury that I have read the foregoing List of Creditors Holding Twenty Largest Unsecured Claims and that it is true and correct to the best of my knowledge, information and belief.

Date _____

Signature /s/ RONAN MARRA
Ronan Marra, *Vice President*

Penalty for making a false statement or concealing property. Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. SS 152 and 3571.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc.,*	*Case No.*
an Ohio Corporation	Chapter 11
	/Debtor

Attorney for Debtor: Irving S. Bergrin

STATEMENT Pursuant to Rule 2016 (b)

The undersigned, pursuant to Rule 2016(b), Rules of Bankruptcy Procedure, states that:

1. The compensation paid or promised by the Debtor(s), to the undersigned, is as follows:

For legal services rendered, Debtor(s) agrees to pay	$ 155.00 per hour
Prior to the filing of this Statement, Debtor(s) has paid	4,500.00
Balance due	unknown

2. The Filing Fee *has been paid.*

3. The Services rendered or to be rendered include the following:

   (a) Analysis of the financial situation, and rendering advice and assistance to the client in determining whether to file a petition under Title 11, U. S. C.

   (b) Preparation and filing of the petition, schedules, statement of affairs and other documents required by the court.

   (c) Representation of the client at the first meeting of creditors.

4. The source of payments made by the debtor(s) to the undersigned was from earnings, wages and compensation for services performed, and none other.

5. The source of payments to be made by the debtor(s) to the undersigned for the unpaid balance remaining, if any, will be from earnings, wages and compensation for services performed, and none other.

6. The undersigned has received no transfer, assignment or pledge of property from the debtor(s) except the following for the value stated: None.

7. The undersigned has not shared or agreed to share with any other entity, other than with members of the undersigned's law firm, any compensation paid or to be paid except as follows: None.

Dated: 3-24-92

Respectfully submitted,

/s/ IRVING S. BERGRIN

Attorney for Petitioner:
Irving S. Bergrin
1600 East Ohio Building
Cleveland, Ohio 44114
Bar No. 00010100

S & M CONSTRUCTORS, INC.

The following Resolutions are hereby adopted in connection with the filing of a Chapter 11 petition, to be filed on February 25, 1992:

RESOLVED, that the Directors unanimously agree that a filing of a Chapter 11 petition is in the best interest of the corporation considering the current financial situation.

RESOLVED FURTHER, that the officers of the company, specifically Ronan Marra, Vice President and Victor Scaravilli, President, be, and each of them hereby is, authorized and empowered to execute on behalf of the company all documents necessary for the filing of said Chapter 11 petition.

RESOLVED FURTHER, that the officers of the company, as named above, be, and each of them hereby is, authorized to execute any and all related instruments, documents, agreements, and certificates, that the said officers deem to be appropriate in connection with the Chapter 11 proceedings.

RESOLVED FURTHER, that the officers of the company, as named above, be, and each of them hereby is, authorized to take all other actions that the officers deem to be appropriate in connection with the Chapter 11 proceedings.

CERTIFICATE AS TO ADOPTION OF RESOLUTION
BY
THE DIRECTORS
OF
S & M CONSTRUCTORS, INC.
(the "Company")
ON
February 24, 1992
(date of adoption)

° ° °

The undersigned certifies that he is the Assistant Secretary of the Company and that a resolution, of which the attached is a true and correct copy, was duly adopted by the Directors of the Company on the above date and is now in full force and effect as shown by the corporate records of the Company.

IN WITNESS WHEREOF, I have hereunto set my hand on February 24, 1992.

/s/ RONAN MARRA
Ronan Marra, Assistant Secretary
S & M Constructors, Inc.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc.,*
an Ohio Corporation — *Case No.*
Chapter 11
/Debtor

Attorney for Debtor: Irving S. Bergrin

Exhibit "A" to Voluntary Petition

1. Debtor's employer identification number is 34-0941329.

2. If any of the debtor's securities are registered under section 12 of the Securities and Exchange Act of 1934, the SEC file number is None.

3. The following financial data is the latest available information and refers to debtor's condition on 2-24-92.

a. Total assets		$ 0
b. Total liabilities		$887,890
		Approximate number of holders
Fixed, liquidated secured debt	$ 0	None
Contingent secured debt	$ 0	None
Disputed secured claims	$ 0	None
Unliquidated secured debt	$ 0	None
		Approximate number of holders
Fixed, liquidated unsecured debt	$887,890	22
Contingent unsecured debt	$ 0	None
Disputed unsecured claims	$ 0	None
Unliquidated unsecured debt	$ 0	None
		Approximate number of holders
Number of shares of preferred stock	$ None	None
Number of shares of common stock	$ 250	5

EXHIBIT "A" CONTINUED

Comments, if any:

4. Brief description of debtor's business:

Construction of underground tunnels

5. List the name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of debtor:

Victor Scaravilli (125 shares)
Anthony J. Marra (60.5 shares)
Angelo J. Marra (62.5 shares)

6. List the names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by debtor: